



AMERICAN BUSINESS LAW



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# **AMERICAN BUSINESS LAW**

# WITH FORMS

BY

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TO
MY PARENTS
THIS WORK
IS AFFECTIONATELY
DEDICATED

"What constitutes a State?

Men who their duties know,
But know their rights, and knowing, dare maintain.

And Sovereign law, that State's collected will, O'er thrones and globes elate Sits empress, crowning good, repressing ill."

Ode in Imitation of Alcaeus - Sir William Jones.

# PREFACE

Business may be defined as that which occupies the time, attention and labor of men for the purpose of a livelihood or profit. Business Law treats of those legal principles applicable to persons engaged in business. A knowledge of the fundamentals of Business Law is of great value not only in enabling its possessor to conduct his business dealings and his correspondence and to prepare his agreements in conformity with the law, but also to assist him in avoiding being taken advantage of by those with whom he deals.

The object of this book is to set forth clearly and concisely those fundamental principles upon which is built the superstructure of Business Law. In order to make clear such principles and at the same time to impress them upon the reader's mind in a practical as well as in a theoretic manner concrete illustrations have been used, some of which are synopses of, and excerpts from, the leading cases de-

cided in Great Britain and the United States.

At the end of each chapter a number of carefully prepared questions have been given referring to the subjectmatter of the text preceding. Some of the hypothetical cases have been chosen from actual decisions of the Courts of Last Resort. The reader should endeavor to work out the answers to each of the questions. By so doing he will gain a more accurate knowledge of the principles set forth. Likewise, by applying such principles to concrete cases, he will train his mind to solve his own difficulties.

A number of legal forms have been given in connection with the various subjects. If the reader has occasion to prepare documents of like character, he may adapt the forms to his own use, but he should be careful not to follow the forms slavishly. In order that the reader may have no diffi-

culty to understand all the technical terms used, whenever a word or expression appears for the first time, it has been defined either in the text or in an accompanying foot-note. Foot-notes containing written matter have been marked and referred to by numbers. Foot-notes containing references and authorities only have been marked and referred to by letters.

The customary method of citing legal authorities has been used in this work. The following four illustrations will explain:

1. Norrington v. Wright, 115 U. S. 188.

This indicates that the case of Norrington versus Wright, reported in the 115th volume of the United States Supreme Court Reports, beginning page 188, is the authority for the rule announced in the text.

2. Shelton v. Ellis, 70 Ga. 297.

Similarly, this refers the student to the case of Shelton versus Ellis, reported in the 70th volume of the reports of the Supreme Court of Georgia, beginning on page 297.

3. Robinson on Elementary Law, ¶ 1.

This calls attention to Section one of Robinson's work on Elementary Law.

4. Cf. Bishop on Contracts, ¶ 715.

Cf.—compare — refers the reader to section seven hundred fifteen of Bishop's work on Contracts; but also indicates that the statement in the text is not entirely harmonious with that in the section of the reference work.

A. B. FREY.

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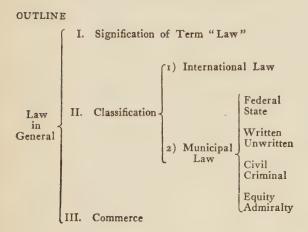
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# AMERICAN BUSINESS LAW

#### CHAPTER I

# LAW IN GENERAL



- I. Broad signification of the term "law"
- 2. Restricted use of the term
- 3. Classification of law
- § 1. Broad sign § 2. Restricted § 3. Classification § 4. Classification § 5. Federal and § 6. Written and § 7. Civil and on § 8. Equity juring § 9. Admiralty § 10. Commerce 4. Classification of municipal law
  - 5. Federal and state law
- 6. Written and unwritten law
- 7. Civil and criminal law
- 8. Equity jurisprudence
- 9. Admiralty jurisprudence
- § 11. Business law
- § 1. Broad Signification of the Term "Law." Broadly speaking, law is a body of rules of conduct prescribed by competent authority. Such authority must exist, for with-

out it we should have a body of requests prayed for, rather than a body of rules prescribed or laid down.

- § 2. Restricted Use of the Term.— In the more restricted signification in which the term "Law" is used in connection with the governing of a state or collection of states, law is a body of rules of civil conduct, prescribed by a competent political authority, commanding what is necessary to, and forbidding what is inconsistent with the peace and order of society. In this narrower application of the term, in order to have law we must have competent political authority. But the expression "political authority" is not used in its popular signification but rather in a technical sense, namely, to denote the law-making power of the state.
- § 3. Classification of Law.— Viewed from this stand-point, law is either International or Municipal: International when the competent political authority is a collection of foreign states; Municipal, when the competent political authority exists within the state. So International Law may be defined as a body of rules of civil conduct which are prescribed by the common consent of the civilized nations and which regulate their intercourse with one another. And Municipal Law is that body of rules of civil conduct, prescribed by competent political authority within a state, which regulates the intercourse of the state with its inhabitants and of those inhabitants with one another.
- (1) Blackstone defines law in its broadest sense to be a rule of action. Blackstone's Commentaries, \* 38-44.
- (2) The phrase "civil conduct" is used in contradistinction to the phrase "moral conduct." Civil conduct means one's behavior or mode of conduct with regard to a state or collection of states. A person's moral conduct may be very imperfect, yet his civil conduct be unimpeachable.
- (3) The expression "prescribed by competent political authority" has been used rather than the expression "prescribed by the supreme power in a state," inasmuch as in the United States the law-making power is only one of the three co-ordinate branches of the government, which are: legislative, judicial, and executive. The student's attention is called to this, inasmuch as "prescribed by the supreme power in a state" is very frequently used.
  - (a) Robinson on Elementary Law, § r.
  - (b) Robinson on Elementary Law, § 2.

§ 4. Classification of Municipal Law.— Municipal Law may be classified as Federal or State Law, Written or Unwritten Law, Civil or Criminal Law, and Equity and Admiralty Jurisprudence.

§ 5. Federal and State Law.—Federal Law is prescribed by the Federal government; State Law, by a State 4

government.

§ 6. Written and Unwritten Law.— The classification of Municipal Law into Written and Unwritten Law should be carefully noted by the student. The definite establishment of a legal rule may be brought about by its being embodied in any one or more of the following: (1) the Constitution of the United States or of a state, (2) the treaties of the United States, (3) the statutes of the United States or of a particular state, (4) the charters and local ordinances of a city or town, and (5) the decisions of the courts of last resort.<sup>5</sup>

The Written Law (lex scripta) within a state comprises (1) the Constitution of the United States and of the State,

(2) the treaties of the United States, (3) the acts of Congress, (4) the statutes of the state legislatures, and (5) the local charters and ordinances. The Unwritten Law (lex non scripta), sometimes called the Common Law, in the original signification of the term, meant those principles of law which were of equal application in all parts of England, that is, common to all, as distinguished from local law. In the narrower and more technical sense, however, the Unwritten or Common Law in any of the states of the United States comprises, first, the body of rules which are evidenced by the decisions of the Courts of Last Resort, and, second, the law derived from England that is not repugnant to the spirit of our government or to the public policy of the particular state where the question arises.

(4) The term "State" as used hereafter throughout this course, unless otherwise specified, means any one of the United States.

(c) Sullivan on American Business Law, § 2.

<sup>(5)</sup> The expression "Court of Last Resort" means the highest court to which a given controversy may ordinarily be carried.

That portion of the Common Law, which consists in the body of rules evidenced by decisions of the Courts of Last Resort, is being constantly increased. It is the dynamic part of the law. Almost daily the appellate courts are rendering decisions involving controversies not previously decided by them. It must be stated that, notwithstanding the doctrine of stare decisis — which means, "let the rule remain as it has been established by previous decisions"—, the Courts of Last Resort, on occasions, do reverse their previous rulings; and then the new rule becomes the precedent and a part of the Common Law, and the old rule becomes inoperative.

Often there is no decision of a Court of Last Resort to act as a precedent for a lower court. In that event, if a given controversy is decided by the lower court, which is a Court of Record, then the ruling of that Court will be considered a precedent for its own future guidance until

such ruling is reversed by a higher court.

#### **EXAMPLE:**

Allen entered into a contract with Baker to ship Baker "about" 1,000 tons of steel every month for one year. In January, Allen shipped 800 tons; in February, 700 tons; in March, 900 tons. Baker refused to accept any more steel, giving as his reason that Allen had breached his contract in that he had not shipped "about" 1,000 tons of steel per month. Allen contended that he had complied with the terms of his contract. The decision in this case would hinge on the construction of the word "about."

Now, if these parties were unable to settle this controversy, they would submit their difficulty in due form to a court for decision. If there was no precedent to follow, that is, no previous decision of a Court of Last Resort bearing on the same or a similar question, the court to which the controversy was submitted would, after examining

(6) A "Court of Record" is a court wherein "the acts and judicial proceedings are enrolled on parchment or paper for a perpetual memorial and testimony and which has power to fine and imprison for contempt of its authority." Justice of the Peace Courts are not Courts of Record, but Circuit Courts and the higher tribunals of the states are Courts of Record. The United States District Courts and higher tribunals are also Courts of Record.—Black's Law Dictionary: Courts of Record.

the facts in the case and hearing the arguments of both parties, reach a definite conclusion and hand down a decision on the question. If the parties were dissatisfied, they might, through proper proceedings, have such a case submitted to a higher tribunal, until, finally the case would come under the cognizance of the Court of Last Resort for that state. That court would either affirm or disaffirm the decision of the lower courts. The rule as to the interpretation of the word "about" would then be definitely established in that jurisdiction; i. e., it would be a rule evidenced by a decision of a Court of Last Resort, and would, therefore, be a part of the Common Law.

But these decisions of Courts of Last Resort form but one portion of the technical Common Law of the various states. The other part is said to consist of the Unwritten or Common Law derived from England, that is, rules evidenced by the decisions of the English Courts of Last Resort, and of statutes and acts of Parliament of a general nature and not local to England, made prior to the American Revolution (or, in some states, prior to the fourth year of the reign of James I; i. e., 1607) which Common Law and statutes are not repugnant to, or inconsistent with the Constitution of the United States, the constitution of the particular state in question, or the statutes in force for the time being in such a state.

§ 7. Civil and Criminal Law.— The term "Civil Law" is generally used to designate the Roman jurisprudence, Jus Civile Romanorum. In the more restricted meaning of the term it designates the private rights and remedies of

men as members of the community.f

Wrongs may be committed either against an individual or against society at large. In its restricted meaning,

- (7) "In this country the Common Law of England has been adopted as the basis of our jurisprudence in all the states except Louisiana, which has the Civil or Roman Law. Many of the most valued principles of the (English) Common Law have been embodied in the Constitution of the United States and the constitutions of the several states."—Bouvier's Law Dictionary: Common Law.
  - (d) Cf. Revised Statutes Mo.: 1909, § 8047. (e) Bouvier's Law Dictionary: Civil Law.
  - (f) Bouvier's Law Dictionary: Civil Law.

"Civil Law," is used in contrast to the expression "Criminal Law," which latter branch of Jurisprudence treats of those wrongs that the government notices as injurious to the public, and punishes in its own name in what is called a criminal proceeding.

#### **EXAMPLES:**

1. Allen entered into a contract with Baker to work for Baker for one month. After working one week, Allen, without cause, repudiated his contract. Baker might then sue Allen for breach of contract. This would be an action 8 for the recovery of compensation for the infraction of a private right.

This case illustrates a wrong against an individual. Such a wrong will go unpunished unless the one injured brings an action through the proper court for redress. Society has not deemed it wise to interfere with the relationship of Allen and Baker in this case, but has left the matter entirely to the injured person. To do otherwise would be to interfere needlessly with individual freedom.

2. On the other hand suppose that Allen met Baker on the street and murdered Baker. Here is a wrong against an individual quite as much as in the first case; but it is a wrong which is a far more extensive interference with the peace and safety of society at large. This interference is of such a nature that society has deemed it prudent to take cognizance of the offense and to prosecute it in the name of society, against which the offense was committed. In this case, Allen's act is a crime, a wrong which the government notices as injurious to the public. Allen would be arrested and later tried for the offense of murder, in a proceeding brought in the name of the state by some representative thereof. Such representatives are called, in some places, Prosecuting Attorneys, in others, Circuit Attorneys, etc.

The difference between civil and criminal offenses is the difference between offenses committed against an individual

- (8) An action is a proceeding before a court of justice on the part of a state or of some person against either a state or another person. It is brought to enforce a right, recover damages for the infringement thereof, or to punish a person for a wrong done. The proceeding must take place before a court of justice in a manner prescribed by law. The person or party instituting the proceeding is called the plaintiff; the person or party against whom the action is brought is termed the defendant.
  - (g) Bishop's New Criminal Law (Eighth Edition), § 32.

and offenses committed against the state. In the former case, there is no prosecution of the offender unless it be at the option of the offended party. In the latter, there is a prosecution of the offender, not directly by the one injured, but by society at large, which takes up the cause of the one injured to prevent similar conduct on the part of other members of the community.

§ 8. Equity Jurisprudence.— In the broadest signification in which the term "Equity" is used, it denotes the spirit and the habit of fairness and honest dealing, which ought to regulate the intercourse of all individuals. "It is therefore the synonym of natural right. But in this sense its obligation is ethical rather than jural, and its discussion belongs to the sphere of morals." It is grounded in the precepts of the conscience, not in any sanction of positive rules of action laid down with authority. And in a somewhat more restricted sense, yet along the same lines of thinking, the word "Equity" denotes equal and impartial justice administered between persons whose rights and claims are in conflict. The equal justice spoken of is ascertained, however, by natural reason or ethical insight and is entirely independent of formulated rules laid down with authority.

But in the purely technical signification in which the term "equity" is used, it has reference to an entire complex system of jurisprudence — well-settled and well-understood rules, principles, and precedents — administered by courts both in England and in the United States. It is "a system of jurisprudence collateral to and in some respects independent of 'law,' properly so called, the object of which is to render the administration of justice more complete, by affording relief where the courts of law are incompetent to give it, or incompetent to give it with effect, or by exercising certain branches of jurisdiction independently of them. This is Equity in its proper modern sense; an elaborate system of rules and procedure administered in many states by distinct tribunals (termed 'Courts of Chancery') and with exclusive jurisdiction over certain subjects. It is 'still dis-

<sup>(</sup>h) Black's Law Dictionary: Equity.

tinguished by its original and animating principle that no right shall be without an adequate remedy,' and its doctrines are founded upon the same basis of natural justice; but its action has become systematized, deprived of any loose and arbitrary character which might once have belonged to it, and as carefully regulated by fixed rules and precedents as the law itself." i

It has been said that Courts of Equity had their origin as far back as the *Curia Regis*, the great court in which the king, assisted by his council, administered justice. And this may well be true, yet the system as we know it took definite shape in, and was administered by, the High Court of Chancery of England in the exercise of its extraordinary jurisdiction.<sup>9</sup>

In order to understand Equity one must know something of the history of the great law courts of England and of the High Court of Chancery. The three great law courts were the Exchequer, Common Pleas, and King's Bench. In order to bring a suit in any one of these, it was necessary to get what was called an originating writ out of Chancery, — the Chancellor's 10 office. These writs soon came to have a rigid form and were granted only in certain definite cases. In all other cases, a petitioner was without remedy except that he had his appeal to the King, who was considered the fountain of all justice. These appeals, however, were not handed to the King in person, but were given to his secretary, the Chancellor, who issued a subpoena — an order to appear — to the opposite party. These cases were then heard by the King and his council and were decided according to the principles of natural justice. Gradually, however, so many of these appeals were presented that the

<sup>(9)</sup> Inasmuch as the High Court of Chancery also had an ordinary jurisdiction which had nothing to do with the subject of Equity, the word "extraordinary" is very essential in this definition.—Bispham on Equity, § 1.

<sup>(10) &</sup>quot;The Chancellor was the secretary of the king, and probably acted as secretary of the council. From his office, the Chancery, issued the writs which authorized suitors to bring their plaints before the king's courts."

— Bispham on Equity, § 5.

<sup>(</sup>i) Black's Law Dictionary: Equity, quoting Burrill.

King was unable to dispose of them. The cases were then heard and decided by the Chancellor acting for the King. Finally, these appeals were made directly to the Chancellor and thus the Court of Chancery grew into existence. "Relief was afforded upon these petitions only in those cases wherein the (great) law courts either could give no redress at all, or could give no adequate redress; and, while in some of these cases the necessity for the interference of a Chancellor has passed away, in others the principles then enforced have furnished the foundation upon which the modern jurisdiction of Courts of Equity has been built."

Thus we see that this system of jurisprudence arose and grew largely because of the rigidity of the Common Law, and the inability of the Common Law Courts to grant adequate relief. Several maxims were adopted as a basis on which to work, such as, "Equity will suffer no right to be without a remedy," "Equity delights to do complete justice," etc. At first this seemed to be an ideal system but the rules of Equity have gradually become more and more rigid. As the system exists today, there are certain Equitable Titles, Rights, and Remedies, and, although it is said that "there is no (equitable) right without a remedy" yet the courts of Equity are loath to depart from the fixed rules to invent a new remedy.

# **EXAMPLES:**

- 1. Equitable Title.— Allen gave his agent, Baker, \$3,000 and directed Baker to buy a house from Carter. Baker was specifically instructed by Allen to have the deed made to Allen, but Baker disobeyed and had the deed made to himself. In law Allen would have no title; but, in Equity, Allen has the Equitable Title and is entitled to the rents and profits, while Baker has no rights whatever in the property. A Court of Equity will compel Baker to pay over these rents and profits.
- 2. Equitable Remedy.— Allen owned an acre of ground on which were standing large, valuable oak trees. Baker unlawfully entered Allen's ground and began to chop down Allen's trees. Allen did not care to wait until his trees were ruined and then be obliged to

<sup>(</sup>j) Bispham on Equity, § 9.

sue Baker, because, first, Allen valued the trees aside from the money worth, and, second, Baker was financially insolvent. In this case, Allen might immediately get an injunction from a Court of Equity restraining Baker from cutting down the trees. (Only Courts of Equity can issue injunctions. If a party violates an injunction, the court may imprison or fine the offender.)

It is necessary for the student to have this brief outline of the origin and history of Equity, inasmuch as the principles and practice of the High Court of Chancery in the administration of this branch of jurisprudence, have been followed both in the Federal and in the State Courts of the United States. In some of the states, 11 separate courts of Chancery, or Equity exist. In other states, 12 Chancery powers are exercised by judges of the Common Law Courts, but according to the course and practice of the Courts of Chancery. In all other states the distinction between actions at law and suits in equity has been abolished, but certain equitable remedies are still administered under the statutory form of the civil action. 13

§ 9. Admiralty Jurisprudence.— Admiralty Jurisprudence embraces that body of rules which deals with maritime contracts, torts, injuries, or offenses.<sup>1</sup>

# **EXAMPLES:**

1. Allen, a sailor on a ship sailing from Galveston, Texas, to Tampa, Florida, assaulted and badly injured Baker, a passenger on that ship. This is properly a case for admiralty jurisdiction.

2. There was a war between the United States and Japan. Two United States vessels jointly attacked and captured a ship laden with Japanese supplies. Both United States vessels claimed

(11) The list includes Alabama, Delaware, Kentucky, Mississippi, New

Jersey, Tennessee .- Bispham on Equity, § 15.

(12) These States are Arkansas, Colorado, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, New Hampshire, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia.—Bispham on Equity, § 15.

(13) The student's attention will be directed from time to time, when

the occasion presents itself, to equitable remedies.

(k) Bispham on Equity, § 15.

(1) Black's Law Dictionary: Admiralty.

the ship as a prize. This is also properly a case for admiralty jurisdiction.

3. Two ships owned by United States citizens collided in New York harbor. Each vessel maintained that the other was responsible for the collision. This is an admiralty case.

State courts have no admiralty jurisdiction. In Article 3, Section 3, of the Constitution of the United States, admiralty jurisdiction is conferred exclusively upon the United States Courts. "The admiralty jurisdiction of the United States extends to the navigable rivers of the United States, whether tidal or not, the lakes, and the waters including them." "

- § 10. Commerce.— We have discussed the various classifications of Municipal Law. Let us now consider briefly the subject of Commerce. 14 Commerce is a term of large import. It includes not only transactions involving the sale and exchange of commodities, but it also embraces navigation, communication, traffic, the transit of persons, and the transmission of messages by telegraph in any and all its forms, including the transportation, purchase, sale, and exchange of commodities, between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states."
- § 11. Business Law.— Bearing in mind this explanation of the subject of commerce, it must be noted that Commercial Law or Business Law is not a separate branch of jurisprudence. It may be said to be any branch of the law, applied to persons engaged in commerce. It includes not only the relations between persons, but also those between the state and the individual. "As the subjects in which Commercial Law, even as administered in any one country, has to deal, are dispersed throughout the globe, it results that

<sup>(14) &</sup>quot;The various agreements which have for their purpose the facilitating of the exchange of the products of the earth or the industry of man with an intent to realize a profit" constitute commerce.—Black's Law Dictionary: Commerce.

<sup>(</sup>m) Bouvier's Law Dictionary: Admiralty.

<sup>(</sup>n) Welton v. The State of Mo., 91 U. S. 275.

Commercial Law is less local and more cosmopolitan in its character than any other great branch of Municipal Law." °

# **QUESTIONS**

I. Define the term "Law" as used in connection with

the governing of a state.

II. Define the following terms: municipal law, courts of last resort, civil law, commercial law and equity.

III. What two valid legal meanings has the term "Common Law"? Which meaning in your judgment

is the broader of the two?

IV. What is the meaning of the expression "Stare Decisis"?

- V. Is the term "Equity" synonymous with the word "right," or does it have a technical meaning?
- VI. Through what tribunals is equity administered? VII. What were the three great Common Law courts?

VIII. What is commerce?

IX. Discuss the term "Common Law" with reference to your own experience.

X. Give an original illustration of an admiralty case.

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J. Kent on American Law

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(Bowen-Merrill Co., Indianapolis)

W. C. Robinson

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(o) Bouvier's Law Dictionary: Commercial Law.

#### International Law -

W. B. Lawrence

(D. C. Heath & Co., Boston)

I. Kent's Commentaries, Part I., Ed. by L. Oppenheim

(Longmans, Green & Co., New York)

J. D. Moore's Digest

(Gout Printing Press, Washington)

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Municipal Law -

W. Blackstone's Commentaries

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# CHAPTER II

#### **TORTS**

# OUTLINE I. Definition II. Distinction [1] Torts and Breaches of Contracts between [2] Torts and Crimes TORT'S III. Test [1] Wrong (Injuria) [1] Positive [1] Malfeasance (Injuria) [2] Negative-Nonfeasance (Injuria) [2] Negative-Nonfeasance

- § 12. Introduction
- § 13. Derivation and definition
- § 14. Torts and breaches of contracts
- § 15. Torts and crimes
- § 16. Test of a tort
- § 17. Malfeasance, misfeasance, and nonfeasance
- § 18. Conclusion
- § 12. Introduction.— Before considering the subject of contracts it may be well to discuss very briefly the subject of torts and to differentiate between a breach of contract 1 and a tort, and between a tort and a crime.2
- § 13. Derivation and Definition.— The word "tort" is derived from the French word tort, a wrong, which, in turn, is derived from the Latin tortus, the past participle of torquere, to twist. As used in law, a tort is any wrong, not
- (1) A breach of contract consists in the violation of the terms of a contract.
- (2) A crime is an act or omission which has been declared by the general law of the State to be a public offense and for which a specific punishment has been affixed.

arising out of breach of contract, for which a private action

for damages may be maintained.a

§ 14. Torts and Breaches of Contract.— A tort is similar to a breach of contract in that both are private acts. For the purpose of this work, it is sufficient to say that torts differ from breaches of contract in that, first, torts usually involve the wilful or negligent injury to the person or property of another and, secondly, certain of the classes of persons, who may avoid their contracts without being obliged to answer in damages therefor, are nevertheless usually liable for their torts.

#### **EXAMPLES:**

1. Allen, without cause and in anger, wilfully struck Baker in the face and injured him. This is the tort of assault and battery.

2. Allen negligently drove his automobile over Baker. This is

also a tort.

3. Allen, a boy of 16 years, agreed to buy a gold mine for \$50,000. When the deed to the mine was offered, Allen refused to accept it. Allen is not liable for his breach of contract. He may plead his infancy as a defense. (An infant is one who has not yet reached the age prescribed by law for his majority.)

4. Allen, a boy of six years, unlawfully entered Baker's premises and broke down and destroyed the shrubbery and flowers. Allen is liable for this tort. He may not plead infancy as a defense in tort

cases. Hutching v. Engel, 17 Wis. 230.

§ 15. Torts and Crimes.— A tort is similar to a crime in that it infringes the same right; i. e., interferes with the absolute or relative rights of some other member of society.<sup>3</sup>

Torts differ from crimes in that the specific wrongful intent necessary for a crime, is almost never necessary for a tort. When an action is instituted by a private individual who is trying to recover money damages for an injury done him, the action is said to be a civil proceeding based on a tort. On the other hand, if the State is bringing an action to punish an individual for a wrong, then the action is said

(a) Bouvier's Law Dictionary: Torts.

<sup>(3)</sup> The absolute rights are the rights of (1) personal security, (2)

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to be a criminal proceeding based on the crime. It must be noted, however, that not every wrongful act is both a tort and a crime. It often is the one or the other. But the same act may be both a public and a private wrong and, in such a case, the act would be both a crime and a tort.

#### **EXAMPLES:**

1. Allen bought a book from Baker. It developed later on, that this book had been stolen by Baker from Carter. But at the time Allen bought the book, he had neither any information nor any suspicion that Baker had stolen the book. Allen would not be lia-

personal liberty, and (3) private property. The relative rights are (1) public and (2) private. They are classified as follows:

Rights Infringed by the following torts: Life ..... Assault Personal Body ..... Battery Security Malicious Prosecution Reputation ..... Libel Slander ABSOLUTE -Personal) ..... False Imprisonment Liberty ( Nuisance ... Injury by Fire Trespass Private Property Personal . Conversion Arising from Relation Violation of Public Officers to Officers to Official Duty Husband and Wife Guardian RELATIVE Abduction, Enticement, or Arising and Seduction of the wife, Ward Private ward, child, or servant by Relation Parent some third person and Child Master and Servant

ble criminally. But he would be liable to Carter in a private action for damages for the tort. The particular tort here mentioned is called "conversion."

- 2. Allen assaulted Baker on a public street. This wrong is both a crime and a tort. Allen might be arrested and tried in an action brought by the *State* in the name of the *State*. Baker might also sue Allen for the Assault.
- § 16. Test of a Tort.— The test of a tort is whether there has been (1) a wrongful act or omission (injuria) by one person (2) which has infringed a right of another person to his actual or legal damage (damnum).

§ 17. Malfeasance, Misfeasance, and Nonfeasance.— The ways in which one may become liable in an action for

tort are the following:

1. By actually doing, to the prejudice of another, some-

thing one ought not to do (malfeasance).

2. By doing something one may rightfully do, but wrongfully or negligently doing it by such means or at such time or in such manner that another is injured (misfeasance).

3. By neglecting to do something which one ought to do, whereby another suffers an injury (nonfeasance).<sup>b</sup>

# **EXAMPLES:**

- 1. Allen, while plowing, brought his horse and plow on Baker's land without Baker's permission. The horse trampled down corn and did other damage. Baker might recover from Allen. (Malfeasance.) Hatch v. Donnell, 74 Me. 163.
- 2. Allen, who kept a reservoir of water on his land, negligently permitted the water to escape from the reservoir, thereby flooding Baker's land. Allen had the right to keep water on his premises in a reservoir if he so desired. But if, through his negligence in constructing or maintaining the reservoir, the water escaped and flooded Baker's land to Baker's detriment, Allen would have to answer in damages to Baker. (Misfeasance.) Chase's Cases on Torts, citing Marshall v. Wellwood, 38 New Jersey Law 339 and notes.
- 3. A statute of a state required railroads to build fences along the right of way. A railroad neglected to do this duty. Some

<sup>(</sup>b) Cooley on Torts, § 60.

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cattle strayed out on the track, fell in an excavation between the tracks and were hurt. The railroad was liable for the injury because of failure to do its duty. (Nonfeasance.) Chapter XX, Cooley on Torts, and cases cited.

§ 18. Conclusion.— In view of the purposes and scope of this work, no further attention will be given to the subject of torts except to quote the following lengthy passage from Cooley on Torts. This quotation will emphasize one of the important distinctions between breaches of contracts

and torts, and between torts and crimes.

"The rules of law respecting the capacity to form contract relations, and the consequent liability for failure to observe such as are entered into, are in the main very precise and definite. Leaving out of view a few exceptional cases, and speaking generally, it may be said that one is not authorized to deal with others on the footing of contract," (unless he has reached his majority) "and that he cannot make the most simple agreement, or enter into the most ordinary legal obligation a day earlier. Neither can he enter into contracts if he is unsound in mind; but his care and protection, and the making of contracts therefor must devolve upon others. The rules of law on this subject have in view the protection of classes supposed, from their immaturity and weakness, (to be) incapable of fully protecting themselves; and though to some extent they are necessarily arbitrary, they are not, because of that quality, a hardship or grievance to those whom they preclude from entering into contracts. Neither are they a hardship or grievance to others whom they deprive of the opportunity to make contracts with immature or imbecile people. As the gains which might be derived from such contracts would be likely to be gains at the expense of those incompetent to protect their own interests, there can be no just complaint of the law which precludes them.

"There are also rules of a like definite character as regards criminal responsibility. An infant under the age of seven can commit no offense against the State. The reason is, that at that immature period he is incapable of under-

standing political or social duties or obligations, and the law assumes as a conclusion not to be disputed — not to be put aside by the uncertain judgment of others — that he can not harbor criminal intent. After that age, until he reaches fourteen, the case is open to proof of actual capacity and actual malice. An idiot or an insane person is also incapable of committing a crime, and to punish one of these as a criminal would be to punish him for a mere animal or insane impulse, or for mere unreasoning and motiveless action, for which he was in no proper sense responsible; to punish him, in short, for his misfortune. The right of the State to protect its people against injurious acts by such persons, and for that purpose to put them under restraints or into confinement, is plain enough; but to punish, as for a wrong, a party incapable of indulging an evil intent is a mere barbarity; not useful as a discipline to the individual punished, and of evil example instead of warning to others. It is, therefore, never to be provided for, but carefully to be guarded against. It is no doubt true that insane persons accused of crime are sometimes convicted and suffer punishment; but this is never intended, and it is attributable to difficulties inherent in such cases; difficulties in discriminating between mental disease and criminal perversion; difficulties in testimony, and infirmities in tribunals. Such results are the misfortunes and accidents of criminal administration, not results at which it aims.

"In determining whether there shall be civil responsibility for wrongs suffered, a standpoint altogether different is occupied. A wrong is an invasion of right, to the damage of the party who suffers it. It consists in the injury done, and not commonly in the purpose, or mental or physical capacity of the person or agent doing it. It may or may not have been done with bad motive; the question of motive is usually a question of aggravation only. Therefore the law, in giving redress, has in view the case of the party injured, and the extent of his injury, and makes what he suffers the measure of compensation. A blow by a youth of eighteen may inflict as serious an injury as a blow by a man of mature

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years, and the torch of a child may destroy a house as effectually as though applied on the twenty-first birthday, instead of the tenth. If, therefore, redress is the object of the law, the party injured should have the same redress in the one case as is provided for him in the other. Neither is it now protection to society that is sought, except as any enforcement of just laws tends incidentally to its protection. There is consequently no anomaly in compelling one who is not chargeable with wrong intent to make compensation for an injury committed by him; for, as is said in an early case 'the reason is, because he that is damaged ought to be recompensed.' If recompense is what the law aims at, it is readily perceived that the question of civil responsibility for wrongs suffered is one that directs our attention chiefly to the injury done; and that the weakness of the party committing it, or the absence of any deliberate purpose to injure, must commonly be of little or no importance.

"The case of an injury suffered at the hands of a lunatic furnishes us with an apt illustration. Let it be supposed that one of this unfortunate class meets a traveler on the highway, and, by force, or by the terror of his threats, takes from him his horse and vehicle, and abuses or destroys them. In a sane person this may have been highway robbery; but the lunatic is incapable of a criminal intent, and therefore commits no crime. Neither is the case one in which a contract to pay for the property, or for the injury, can be implied, for the law can imply no contract relations where the capacity to enter into them is withheld. But a plain wrong has been done, because the traveler has been forcibly deprived of his property; and if the person at whose hands the wrong has been suffered is possessed of an estate from which compensation can be made, no reason appears why this estate should not be burdened to make it. In other words, it seems but just that the consequences of the unfortunate occurrence should fall upon the estate of the person committing the injury, rather than upon that of the person who suf-

"But it does not follow that the responsibility of persons

fered it.

mentally incompetent should be co-extensive in all respects with that of other persons. If compensation to the person wronged is what is aimed at, the difference in some cases will be very manifest; for sometimes that which might be seriously injurious if done by a person sui juris (one not under any legal disability) will be perfectly harmless when the actor is insane. In other cases where that which is done is unquestionably injurious, the extent of the injury will depend very largely on the presence or absence of an actual evil design. An illustration of the class last mentioned is afforded by the case of Krom v. Schoonmaker.° There a magistrate was sued for issuing void process on which the plaintiff was arrested. The case, on its facts, seemed one of gross outrage. It was proved that the magistrate had no complaint before him; that he refused bail after arrest, and that he avowed a determination to pursue the plaintiff until he should be incarcerated in prison under a conviction. This made out a case of very serious oppression and wrong, such as a jury would be warranted in condemning by a heavy award of what are sometimes called punitive or vindictive damages. But when it was shown that the magistrate was insane, all the aggravation of the wrong disappeared. A sane man could only have done such an act from malice, and the outrage and injury to the arrested party would be greatly enhanced by the motive. The insane man could have no malice, but would probably act under the delusion that official duty impelled him. The aggravation of motive would consequently be wholly wanting. While, therefore, the sane person might justly be compelled to pay damages proportioned to the malignity of his motives, the insane person would make full reparation if he were required to meet the actual damages which the injured party had suffered in person or estate, leaving wholly out of view any aggravation which malice might have supplied."

<sup>(</sup>c) 3 Barbour's Supreme Court Reports (N. Y.), 647.

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# **QUESTIONS**

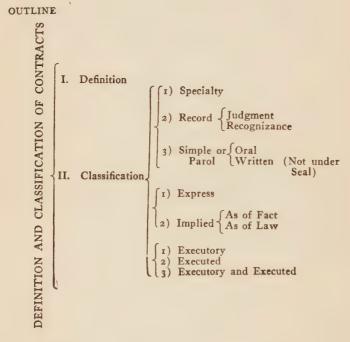
- I. Distinguish between torts and crimes and between torts and breaches of contract.
- II. What is the test of the commission of a tort?
- III. Define the following terms: Misfeasance, crime, tort.
- IV. Allen, a boy of five years, threw a stone at Baker, which struck Baker in the head and seriously injured him. Can Baker recover from Allen for this injury? Discuss in your own way the theory of recovery in torts as distinguished from the theory of the criminal law.

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H. Smith's Addison on Torts
(Banks & Brother, New York)
T. M. Cooley on Torts
(Callaghan & Co., Chicago)
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Negligence Compensation Cases Annotated
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# CHAPTER III

# DEFINITION AND CLASSIFICATION OF CONTRACTS



- § 19. Definition
- § 20. Specialty, record, and simple contracts
- § 21. Express and implied contracts
- § 22. Executory and executed contracts
- § 19. Definition.— A contract is an agreement, entered into with real consent (or created by law), by and between two or more competent parties, and supported by a sufficient

consideration to do or not to do some lawful act, all of which is in the form sanctioned by the law.

- § 20. Specialty, Record and Simple Contracts.— Contracts may be classified as follows: (1) contracts by specialty; (2) contracts of record; and (3) parol or simple contracts.
- (1) "Contracts by specialty" or "contracts under seal" are those which have a seal or scrawl attached to the names of the parties to the contract, such as deeds and bonds.

(2) "Contracts of record a are those which are evidenced by the record of some court, such as judgments 2 and recognizances.3

- (3) "Simple" or "parol" contracts include all written contracts not under seal or of record, and all oral contracts. The term "parol" properly means "a word, speech, hence, oral or verbal, expressed or evidenced by speech only." But, inasmuch as formerly there was no distinction, in legal effect, between a written contract not under seal or of record, and an oral contract, the term "parol" was applied indiscriminately to both classes. This misuse of the word often confuses the student. In this work the
- (1) Two of the definitions found elsewhere are: "A contract is an agreement, upon sufficient consideration, to do or not do a particular thing."

   Blackstone's Commentaries, \* 442.

"A contract is an agreement, either express or implied, to do or refrain from doing some act, which the law will enforce."—Thayer's Synopsis of the Law of Contracts, § 1.

(2) A judgment is "the official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination."—Black's Law Dictionary: Judgment.

(3) A recognizance, as defined in the English law books, is "an obligation of record, entered into before some court of record, or magistrate duly authorized, with condition to do some particular act; as to appear at the assizes, or criminal court, to keep the peace, to pay a debt, or the like."

"In the practice of several of the states a recognizance is a species of bailbond or security, given by the prisoner either on being bound over for trial or on his taking an appeal."—Black's Law Dictionary: Recognizance.

- (a) Thayer's Synopsis of the Law of Contracts, § 37.
- (b) Black's Law Dictionary: Parol.

word "parol" will be used only in its correct signification, that is, to mean oral or verbal. Wherever it is necessary to indicate by a single word the two classes of contracts, that is, written contracts, not under seal or of record, and oral contracts, the word "simple" will be substituted. This use of the word "simple" is sanctioned by reliable authority."

§ 21. Express and Implied Contracts.— Contracts are also classified as follows: (1) express contracts and (2) implied contracts. An express contract is one which is expressed in words either oral or written. An implied contract is one the terms of which are to be gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties.<sup>d</sup>

Implied contracts are subdivided into two classes, to-wit, contracts implied as of fact, and contracts created by law.

Contracts implied as of fact are those implied from the acts of the parties and the circumstances surrounding those acts. Such contracts differ from express contracts only in the nature of the means of proving the agreement. In express contracts, the means of proof consists of the spoken or written words, while in contracts implied as of fact, it consists of acts and circumstances.

# **EXAMPLES:**

- 1. Allen said to Baker, "I will sell you this watch for \$50." Baker answered, "I will buy it at that price." This was an express contract.
- 2. Allen was the proprietor of a hat store. Baker walked into the store, was fitted with a hat, and turned to Allen, saying, "I will take this hat. Send it to my residence." Allen sent the hat to the residence and it was accepted. This was a contract implied as of fact.

Here Allen would be bound to pay the reasonable value of the hat, notwithstanding the fact that nothing had been said about the price.

- (c) Cf. Bishop on Contracts: Index of Subjects, Simple Contracts.
- (d) Black's Law Dictionary: Express and Implied Contracts.
- (e) Thayer's Synopsis of the Law of Contracts, § 3.

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A contract implied as of law, or, as it is often termed, a contract created by law, is such a contract as is created by law although no agreement whatever exists between the parties.<sup>4</sup> Properly speaking, we should call such a creation of the law a quasi-contract, that is, in the nature of a contract, for the term "contract," unqualified, implies agreement and mutual assent of the parties. In contracts created by law there is usually not only an absence of agreement and mutual assent but often a contrary intention existing in the mind of the party bound. In these cases the law creates a promise from the party bound to the other, though in fact none was made.<sup>f</sup>

#### **EXAMPLES:**

- r. Mr. Allen, without cause, deserted his wife. Being in need of necessaries, Mrs. Allen ordered groceries from Baker, and she received them. Here Baker might recover from Mr. Allen the reasonable value of the groceries on the contract created by law, as it is the legal duty of every man to support his wife, and such duty cannot be evaded by desertion, if there is no valid legal cause for such desertion.
- 2. Allen, a boy of 16 years, being in need of a suit of clothes, went to Mr. Baker's store and ordered such a suit, agreeing to pay \$40 for it. Allen got the suit and, after wearing it, refused to pay for it. Baker sued Allen for \$40, the price agreed upon.

Now the general rule is that an infant, that is, one not of legal age, can, if he so desires, avoid his contractual obligations; but if, legally considered, Allen needed the suit of clothes which he ordered; i. e., if the court decided that in this case the suit was a necessary, and if he received and wore it, he would be bound to pay for it. He would not have to pay the \$40, however, nor would he be bound by his original contract with Baker. The law, in this case, would imply a contract, and Allen would be bound to pay the merchant for the reasonable value of the suit. What such a reasonable value is would have to be determined either by the jury, or, if the parties wish no jury, then by the judge.

(4) The student should note that, in the definition of contracts given in the text, the expression "created by law" has been advisedly inserted but has been placed in parentheses.

(f) Cf. Bishop on Contracts, Chapter VIII.

§ 22. Executory and Executed Contracts.— (1) An executory contract is one which has not been performed on either side. The term is also applied to contracts in which one party has performed and the other has not; but, properly speaking, such a contract is executed on one side and executory on the other. (2) An executed contract is one which has been fully performed on both sides.

#### **EXAMPLES:**

1. Allen agreed to pay Baker \$5,000 if Baker built a house for him. This was a purely executory contract, for neither Allen nor Baker had done anything toward the fulfilment.

2. Allen agreed to pay Baker \$5,000 if Baker built a house for him. Baker built the house, and Allen paid the \$5,000. This was

an executed contract.

3. Allen agreed to pay Baker \$5,000 if Baker built a house for him. Baker built the house as agreed, but Allen had not yet paid the \$5,000. Here the contract was executed so far as Baker was concerned, but executory on Allen's part.

# **QUESTIONS**

I. Define the term "Contract."

II. Give three distinct classifications of contracts, and state the basis of each classification. Which of these classes, if any, do you consider most important?

III. What two kinds of implied contracts are there?
Give an original illustration of each class.

IV. Give an original illustration of a contract partly executory and partly executed.

V. Define the following terms: Judgment, recognizance, and contract created by law.

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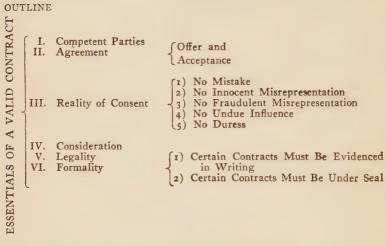
A. Thayer's Synopsis of the Law of Contracts (W. W. Brewer & Co., St. Louis)

(g) Cf. Bouvier's Law Dictionary: Contracts; also Bishop on Contracts, § 624.

J. P. Bishop on Contracts
(T. H. Flood & Co., Chicago)
T. Parsons on Contracts
(Little, Brown & Co., Boston)
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(F. H. Thomas Law Book Co., St. Louis)
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# CHAPTER IV

# ESSENTIALS OF A VALID CONTRACT



- § 23. Essentials stated
- § 24. Difference of opinion as to what essentials are
- § 23. Essentials Stated.— The attention of the reader is directed to the following six essential elements of an enforceable contract:
  - (1) There must be two or more competent parties.
- (2) These competent parties must enter into an agreement; that is, there must be an offer by one and an acceptance by the other.
- (3) The competent parties must arrive at the agreement with real consent; that is, there must not have been present at the time of making the contract any mutual mistake, innocent or fraudulent misrepresentation, undue influence, or duress.<sup>1</sup>
  - (1) Duress is any unlawful physical force, applied, or threatened to the

(4) The agreement which the competent parties enter into with real consent must be supported by a sufficient consideration under the circumstances. In some States a "seal" imports a sufficient consideration.

(5) The agreement entered into with the real consent of the competent parties and supported by a sufficient consideration must be to do some lawful thing; that is, the object of the contract must be to do some act neither contrary to the public policy of the state nor to the law of the land.

(6) The agreement entered into with the real consent of competent parties and supported by a sufficient consideration to do or not to do a lawful act must in some classes of

contracts be evidence in writing or be under seal.2

§ 24. Difference of Opinion as to What Essentials Are.— Writers on the subject of contracts have not been careful in formulating their definitions of the word "contracts" to include all the essentials. Some authors have said that a contract is (1) an agreement (2) entered into with mutual consent (3) to do or not to do an act. In this definition a contract is viewed merely as an abstraction. The student of Law, however, as well as the lawyer, is not concerned with useless abstractions but is rather interested in the subject from the standpoint of the essentials of such a contract as may be enforced at law or such a contract for the breach of which damages will be given. It is, therefore, earnestly recommended that the reader thoroughly familiarize himself with all the essentials of the subject as herein set forth.

# QUESTION

# I. State the essentials of an enforceable contract.

person of a party, or to the person of a party's husband, wife, parent, or child, through constraint of which he, in form, consents to what he otherwise would not. Cf. Bishop on Contracts, § 715.

(2) Each of these essentials will be treated under a separate heading

and in detail in the following pages.

(a) Cf. Bouvier's Law Dictionary: Contracts, also 9 Cyclopedia of Law and Procedure: Contracts, § 1.

# REFERENCE

(Banks & Co., Albany)

A. Thayer's Synopsis of the Law of Contracts
(W. W. Brewer & Co., St. Louis)
J. P. Bishop on Contracts
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J. Chitty, Jr., on Contracts
(Hurd & Houghton, Riverside Press, Cambridge)
T. Parsons on Contracts
(Little, Brown & Co., Boston)
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Huffcut and Woodruff Cases on Contracts

# CHAPTER V

# COMPETENT PARTIES

OUTLINE

COMPETENT PARTIES

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§ 51. General rule and exceptions

§ 25. Introductory.—The general rule with reference to the competency of parties to contract may be said to be that all persons not mentally deficient and not laboring under any special legal disability are competent in the eyes of the law to enter into contracts. It will be the purpose of this chapter to discuss the agreements, and the obligations arising therefrom, of persons mentally deficient and of those who are under special legal disability.

Persons mentally deficient may be said to be of two

classes:

Section I. Insane Persons Section II. Habitual Drunkards

# SECTION I

# Insane Persons

§ 26. Insanity Defined.— In the law of Contracts insanity is such an imperfection or derangement of the mind as disqualifies a person from understanding the subject-matter and nature of the contract he is about to make, and the probable consequences that will arise therefrom. The law does not concern itself with a person's general sanity but is concerned with mental capacity to do the particular act which is the subject of judicial investigation.

(a) Bishop on Contracts, § 962.

(b) Cf. Bouvier's Law Dictionary: Insanity, citing authorities.

#### **EXAMPLE:**

Allen granted a piece of land to Baker for a valuable consideration. Allen then died, leaving no will. Allen's daughter attempted to recover the piece of land which Allen had granted to Baker on the ground that Allen was insane when he conducted the transaction with Baker and, therefore, the grant was void, that is, of no validity.

It was decided that, inasmuch as Allen had executed and delivered to Baker said deed, understanding and comprehending the *nature* of his (Allen's) act, the *consideration* to be paid, and that he was thus transferring the title of the property therein described to Baker, and he (Baker) thereby got a good title whether Allen was or was not at the time of making the grant mentally unsound as to *other transactions*. Hovey v. Hobson, 55 Me. 256.

# Rights and Obligations of Insane Persons

§ 27. Classification.— At the outset of the discussion as to the rights and obligations of insane persons who have entered into agreements, it may be said that there are two classes of such persons:

1. Such persons who have been adjudged by a court (having jurisdiction) to be insane; i. e., unable to enter into any agreement, and for whom a guardian has been appointed by the court.

2. Insane persons not legally adjudged to be insane.

# Contracts of Insane Persons

- § 28. (1) Those Persons Judicially Declared to be Insane.—"In most states, generally by express statutory provision the contracts of a person who has been judicially declared insane and placed under guardianship, are absolutely void 1 and not merely voidable." There seems to be an
  - (c) 22 Cyclopedia of Law and Procedure, § 1198.
- (1) Void and Voidable.—It is necessary to say a word in regard to the use of the terms "void" and "voidable" as used in law. These terms have a technical legal signification but, unfortunately, as employed by many courts and law writers, they have been given variable meanings.

Properly speaking, if a contract is void, it is without any legal effect whatsoever. No rights or obligations can arise therefrom. So a void deed of land conveys absolutely nothing and the grantee in the deed need not pay exception to this rule in that, if the guardian does not supply the insane person with necessaries, an outsider may do so and may collect for the reasonable value of such necessaries.<sup>2</sup>

#### **EXAMPLE:**

Allen was declared to be insane in March, 1866, by a court having jurisdiction. A guardian was likewise appointed. In October, 1867, Allen, during a time of temporary soundness of mind, signed a deed conveying a piece of real estate to Baker for which Baker paid the sum of \$1,300, the value of the land. Allen died in June, 1868. Allen's wife then sued Baker for her dower; i. e., the widow's interest in her husband's realty.

The court held that the deed of an insane person after being placed under guardianship is absolutely void "and the same is true of a person under guardianship for incapacity to manage his affairs, even though he is not, in fact, insane." Gerner v. Rannels, 80 Mo. 474.

§ 29. (2) Those Persons Not Judicially Declared to be Insane.— "The following propositions seem to be supported by the most recent decisions:

for the land. On the other hand, if a contract is voidable, it is good and binding until it is avoided.

(2) The term "necessaries" includes any goods or services needed by the insane person or his family for their subsistence, shelter, and for their reasonable comfort according to their circumstances and conditions of life. provided they have not a sufficient supply of such goods.

#### EXAMPLES:

- x. Allen agreed with Baker that for a consideration of \$1,000, to be paid by Baker, Allen would murder Carter. After making this promise, but before the date set for the act, Allen decided that he would not fulfil his promise. Inasmuch as this was a contract to do an illegal act, it was void. Therefore Allen was under no obligation whatever to commit the murder, and Baker could not be compelled to pay the money.
- 2. Allen, a boy of 17, agreed to marry Miss Baker (a woman of 25 years), who, in turn, agreed to marry Allen. Now if Allen wishes to withdraw from this contract, he may do so without being liable in damages inasmuch as he (Allen) had not yet attained his majority when he entered into the contract. Therefore this is called a voidable contract; i. e., it was a good contract until Allen renounced it when it lost its character as a contract and becomes merely an unenforceable promise.

1. "That the contract of an insane person, so long as it remains wholly executory, will not be enforced.

- 2. "That the courts will not disturb a contract with an insane party that has been fully executed, if the contract was fair and honest, and was entered into without any knowledge or suspicion of the person's incapacity—unless both parties can be placed in statu quo, but if both parties can unquestionably be placed in statu quo, most courts (in this country) will lend every aid in setting the contract aside.
- 3. "That when a contract is fair and honest, and was entered into without knowledge or suspicion of a party's insanity, and had been executed on one side, the courts will refuse to set it aside at the instance of the insane person unless the latter restores all that has been received thereunder.
- 4. "That when a contract is made by a person who either knows or has reason to suspect that the person with whom he is dealing is insane, such a contract, although executed, will be annulled (if the insane person desires it), and the party so dealing with the insane person will be compelled to restore what he has received, although the insane person may not be able to restore all that he may have obtained under the contract. The same result follows when a contract made with an insane person is not fair and honest." d

# **EXAMPLES:**

- 1. Allen, an insane man, agreed with Baker to sell Baker a horse and buggy on the following day, for which Baker agreed to pay \$150. Allen refused to fulfil his agreement. Baker did not know of Allen's insanity. Nevertheless, Allen is not bound by his (Allen's) promise.
- (3) The expression to place the parties in statu quo means to place them in the condition in which they were before entering into the contract. Suppose that Allen had paid Baker \$100 and had received from Baker a horse; to place the parties in statu quo Allen would get his \$100 and Baker would have returned to him his horse.
  - (d) Thayer's Synopsis of the Law of Contracts, §§ 202-3.

2. Allen sold goods to Baker to the amount of \$658.75. Baker paid \$400 on this bill leaving a balance due of \$258.75. Just at this time Baker died, and his administrator refused to pay the \$258.75 claiming that Baker was insane when he ordered the goods. The court held that Baker's estate was liable for the value of the merchandise received inasmuch as Allen had known nothing of Baker's mental condition, had not taken any advantage of Baker, had fully executed his (Allen's) side of the contract, and could not be placed in statu quo. Mutual Life Ins. Co. v. C. Hunt, 79 N. Y. 541.

3. Allen, while insane, made a deed of land to Baker, who knew of Allen's insanity. Allen's heirs sued to get the land back. It was held that they could recover the land. Creekmore v. Baxter,

121 N. C. 31.

# SECTION II

#### Drunkards

- § 30. (1) Those Judicially Declared to be Habitual Drunkards.— The same rule applies here as was said to be the law in cases where parties are judicially declared to be insane.
- § 31. (2) Those Not Judicially Declared to be Habitual Drunkards.— The general rule is that, if intoxication is so excessive that it deprives the party of his ability to understand the nature of the contract and its probable consequences, the contract is voidable at the election of the drunkard.

Persons laboring under special legal disability are of four classes:

Section III. Infants

Section IV. Married Women

Section V. Corporations

Section VI. Foreigners

# SECTION III

# Infants or Minors

§ 32. Definition.— "An infant (or minor) is a person who has not arrived at the age fixed by the common law

or by statute as the time when a person is presumed to have

reached full maturity." °

§ 33. When Infants Become of Age.— By the common law—that which came from England—males and females are considered infants until one day before their 21st birthday. But by statute in some states 4 females are considered of age, at least for certain purposes, on the day before their 18th birthday. Fractions of a day are not considered, so that if an infant is born at any hour in the first day of January, 1900, he will be considered of age all day on the 31st of December, 1920.

§ 34. Age of 21 Fixed Upon Arbitrarily.— The student may wonder why the age of twenty-one was chosen as the time at which one arrives at maturity. He may ask the question: Is not a young man of twenty years and eight months as competent as one of twenty-one years? The only reply to such a query is that the age of twenty-one was arbitrarily fixed upon as approximately the time when the average man or woman would be competent to contract intelligently. Inasmuch as all persons are legally presumed to know the law, it is the duty of every person to ascertain if the one with whom he is dealing is or is not an infant and to guide himself accordingly.

# Infants' Contracts

- § 35. Infants' Contracts Voidable.— To state the general rule, it may be said that the contracts of an infant are voidable; i. e., good until avoided. To this rule there are
- (4) In Arkansas, California, Colorado, Idaho, Illinois, Iowa, Kansas, Maryland, Minnesota, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oregon, South Dakota, Vermont, and Washington, women attain their majority at 18.

In Nebraska, a married woman is of age at 16 years. In Washington, a woman is of age if married to a man who has reached 21. In Maryland and Oregon, a woman comes of age on being married and in Iowa, Louisiana, and Texas, all minors are deemed of age on being married.—Sullivan's American Business Law: Infants.

- (e) 22 Cyclopedia of Law and Procedure, § 511.
- (f) 22 Cyclopedia of Law and Procedure: Infants.

a number of exceptions, which will be considered in the remainder of this section, in which the contracts of an infant

are held valid and binding.

- § 36. Who May Plead Infancy.— In an action on a contract the defense of "infancy" is available only to the infant and not to the adult. Before one enters into a contract it is his duty to ascertain that the other party thereto has reached his majority. For this reason it is held that the adult is bound by the contract if the infant wishes to hold him.<sup>g</sup>
- § 37. Executory Contracts.— All wholly executory contracts of an infant are voidable.

#### **EXAMPLE:**

- 1. Allen, an infant, ordered \$10 worth of groceries. Five minutes later, before anything had been done by the grocer, Allen canceled his order. Allen can not be held on this agreement.
- § 38. Fully Executed Contracts.— All fully executed contracts of an infant are also voidable except the following, which are binding on the infant:

(1) Contracts of marriage. This means the actual marriage. The infant's agreement to marry is voidable like

all other executory agreements.

- (2) Contracts for enlistment in the army or navy. This, likewise, means the actual enlistment. So also the following exceptions deal with the fully executed contract.
  - (3) Recognizances of an infant in a criminal case.
- (4) Contracts which an infant enters into and executes to do something which the law would compel him to do; for example, if an infant makes a division of real estate which has been willed in common to him and to some second party. Here, inasmuch as the law would decree a division, should the parties desire it, if the infant makes a division and no fraud is practiced on him, the contract will stand.

(5) Money invested by an infant in a corporation or

partnership.

(g) Thayer's Synopsis of the Law of Contracts, § 196a.

If an infant invests his money in a partnership or buys stock in a corporation, he can not draw out the money invested, if, by such a withdrawal, the rights of creditors, i. e., third persons who have money due them from the partnership or corporation, would be injured or prejudiced.

(6) Contracts for necessaries.

If necessaries 5 are furnished an infant and he pays for them, his contracts therefor will not be avoided by law.

§ 39. Contracts Executed by the Adult but Not Executed by the Infant.— Contracts executed by the adult, but not by the infant, are likewise voidable, the only exception to this rule being in the case of infants' contracts for necessaries.

#### Necessaries

§ 40. Definition.— The term "necessaries" includes any goods or services needed by the infant for his subsistence, shelter, education, and for his reasonable comfort (provided he has not a sufficient supply of such goods) taking into consideration the infant's wealth, occupation, health, assist position, and in general all his surroundings.

social position, and, in general, all his surroundings.

§ 41. Rules.— Wholly executory contracts for necessaries are not binding. Partly and fully executed contracts for necessaries will not be disturbed, provided no fraud has been practiced on the infant. If, however, the infant has been overcharged, he need pay only the reasonable value for the necessaries. And some courts hold that suit cannot be brought on the contract itself, but that the adult may recover only for the reasonable value of the necessaries. Before giving examples under this discussion, it may be well to state that the reason for holding an infant to contracts in which he has received necessaries is that, if this were not the rule, there would often be times when infants would undergo much suffering from lack of such necessaries.

# **EXAMPLES:**

- 1. Allen, an infant, bought a horse and buggy for \$150. Allen
- (5) What are necessaries is considered in § 40.

was not engaged in any business requiring the use of a buggy, nor did his social position demand it. Suit was brought against Allen for the price. The court held that the articles purchased were not necessaries. Heffington v. Jackson, 96 South Western Reporter (Texas) 108.

- 2. Allen, an infant of fifteen years, had certain of his teeth filled by Baker, a dentist. The bill was \$40. Inasmuch as the evidence showed that the teeth were decayed and that Allen was rich, the services were held to have been for necessaries. Strong v. Foote, 42 Conn. 203.
- 3. Allen, a minor, bought goods of Baker which goods were ordinarily considered necessaries. But Allen had already been fully supplied with such goods. In a suit to recover the price of the goods, it was held that, if Allen was already fully supplied with necessaries at the time of the purchase from Baker, then such goods lost their character as necessaries and Baker was not entitled to recover. The burden was on the tradesman to prove that the goods were necessaries in the true sense of the word.

## Ratification and Disaffirmance

§ 42. When Infants May Ratify.— After an infant reaches his majority, he may ratify his voidable contract made during infancy. The ratification 6 requires no new consideration and, after ratification, the contract will be as binding as if entered into after he had reached his majority.

§ 43. Express and Implied Ratification.— The ratification may be evidenced either, first by an express agreement by the infant to be bound by the contract or, second, by such acts and conduct from which an agreement to be bound will be implied. In some states, however, statutes have been enacted requiring the ratification to be in writing.<sup>h</sup>

§ 44. Some Facts About Ratification.— It is a well established rule that ratification must be in toto; i. e., the one formerly an infant must ratify the whole agreement. He cannot partly affirm and partly disaffirm. And, after

(6) By ratification is meant the confirmation of a previous act done either by one's self or by some one else acting on one's behalf.—Black's Law Dictionary: Ratification.

(7) Disaffirmance is the opposite of ratification. It consists in the repudiation of an agreement previously entered into.

(h) Revised Statutes, Mo., 1909, § 2786.

the former infant reaches his majority, if a contract is once ratified by him, he cannot later disaffirm it. So also, if the contract has been disaffirmed, ratification cannot take place. Of course, if the parties so desire, they may enter into a new contract covering the same subject matter.

#### **EXAMPLES:**

1. Allen, a minor, bought \$2,000 worth of merchandise (not necessaries) from Baker and did not pay for it. After reaching his majority, Allen wrote a letter to Baker in which he promised to pay for the merchandise. Here Allen has ratified the former contract and he is now bound thereby.

2. Baker sold and delivered a plow to Allen who agreed to pay \$20 for it. Allen did not pay for the plow but, after reaching his majority, he kept the plow and continued to use it for some time. Baker can recover from Allen the \$20, for Allen has, by his conduct, ratified the contract. Cf. Curry v. St. John Plow Co., 55 Ill. Ap-

pellate Court Reports 82.

- 3. Allen, an infant, bought a team of mules from Baker but did not pay for them. Upon reaching his majority Allen notified Baker that he disaffirmed the contract. Inasmuch as Allen still had the mules in his possession, Baker could get them back upon the disaffirmance.
- 4. Allen, an infant, bought a house from Baker. Upon reaching his majority, Allen ratified his purchase. Later he regretted that he had ratified the agreement and he attempted to disaffirm. He could not do so.
- § 45. When an Infant May Disaffirm.— An infant may disaffirm any of his voidable contracts, except his conveyance of real estate, before or after coming of age. He must wait, however, until he reaches his majority before he can disaffirm his conveyance of realty.

## **EXAMPLES:**

- 1. Allen, an infant, bought \$500 worth of trees. A week later, Allen tendered back the trees and demanded the return of his money.
- (i) Schouler on Domestic Relations, § 409; also Bishop on Contracts, § 938.

The court held that he could disaffirm immediately if he saw fit. Childs v. Dobbins, 55 Iowa 205.

- 2. Allen, an infant, brought an action to set aside her conveyance of realty before she had reached her majority. The court said: "It would seem to be settled by the decisions of this court that an infant cannot disaffirm or avoid his conveyance of real estate, simply on the ground of infancy, which is the only ground relied upon in the case at bar, until his or her arrival at majority." Welch v. Bunce, 83 Ind. 382.
- § 46. How Disaffirmance Takes Place.— Disaffirmance in the case of a fully executed contract must be by some positive act or statement. But if the contract is executory and suit is brought against the infant, then he may set up the plea of infancy and this will be a sufficient disaffirmance.

#### **EXAMPLE:**

Allen, an infant, and Baker, an adult, entered into and fully executed a contract. Later Allen wished to disaffirm that contract. In this case it was his duty to advise Baker of this fact in definite terms.

- § 47. What an Infant Must Do Upon Disaffirmance.—It has been said that an infant may avoid most of his contracts, certain exceptions alone being given. It must now be noted that "when a minor disaffirms his contract, it is his duty to restore to the opposite party all that he has received on the contract, either in the form of money or property, if it is within his power to do so. But if, during his minority, the infant has wasted or squandered the money or property received by him from the opposite party, and is, for that reason, unable to restore it, he may, nevertheless, reclaim what he has parted with. In other words, an infant's right to disaffirm his voidable contract, unless the case is very exceptional, does not depend upon his ability to make restitution of that which he has received."
  - (j) Thayer's Synopsis of the Law of Contracts, § 196.

#### **EXAMPLE:**

1. Allen, an infant, conveyed a piece of real estate to his father. Allen then squandered the money which his father paid him for the property. When Allen became of age, he decided that he wanted his property. He had nothing, however, with which to repay his father. The court held that he had a right to recover his property even though he was unable to restore the consideration. To quote from the decision:

"The right to repudiate is based upon the incapacity of the infant to contract, and that incapacity applies as well to the avails (the money which the infant received for the real estate) as to the property itself, and when the avails of the property are improvidently spent or lost by speculation or otherwise during minority, the infant should not be held responsible for an inability to restore them. To do so would operate as a serious restriction upon the right of an infant to avoid his contract and in many cases would destroy the right altogether.

"The right to rescind is a legal right established for the protection of the infant, and to make it dependent upon performing an impossibility, which impossibility has resulted from acts which the law presumes him incapable of performing, would tend to impair the right and withdraw the protection." Green v. Green, 69 N. Y. 553.

## SECTION IV

# Married Women

- § 48. Common Law and Statutory Rule.— At the common law the husband and wife were considered as one person. Upon marriage the legal existence of the wife was, for most purposes, suspended during marriage, and her identity was merged in that of her husband, who was the head of the family. Upon the marriage he received a life interest in his wife's realty; absolute ownership of her personal property in possession; and the right to reduce to possession her so-called choses in action, i. e., rights of action. A married woman, called femme covert, lost all power to contract.<sup>8</sup> Her agreements with few exceptions were abso-
- (8) There were some exceptions to this rule but owing to the limitations of this work they can not be here treated.

lutely void.<sup>k</sup> These rules have been modified or altered by statutes in many, if not in all states. By these statutes, a married woman may contract almost as freely as an unmarried woman, called a femme sole. In some states she may even contract with her own husband as if he were a stranger.

# SECTION V

# Contractual Powers of Corporations

- § 49. Definition of Corporation.— The subject of corporations is one about which many volumes have been written. For our present purposes it is sufficient to say that a corporation is an artificial person or being created under authority of the law to do certain acts or classes of acts; for example, corporations to manufacture steel rails or to conduct banks.<sup>9</sup>
- § 50. Powers of a Corporation.— A corporation has such powers as are expressly conferred on it by its charter; such implied powers as may be reasonably considered necessary to carry into effect the express powers conferred; and such incidental powers as are possessed by every corporation. For example, a corporation created for mining purposes has all the express powers given in the charter to operate a mine and the implied power to purchase cars and tools and employ men to do the mining and such incidental powers as are common to all corporations, such as the right to have a seal. But such a corporation would, clearly, have no power to enter into contracts for the purpose of conducting an art museum. In this sense corporations and so also joint stock companies are under certain legal disabilities in contracting.

(9) See also joint-stock companies.

(k) Cf. Bishop on Contracts, Chapter XXXIV; also 21 Cyclopedia Law and Procedure: Husband and Wife.

## SECTION VI

# Contractual Power of Foreigners

§ 51. General Rule and Exceptions.— The general rule is that foreigners 10 residing in the United States have full contractual powers. To this rule there are two exceptions.

(1) A number of states limit the power of foreigners

in the matter of buying, selling, or holding real estate.

(2) If the country to which the foreigner owes allegiance is at war with the United States, any agreement made by such a foreigner with a citizen of the United States, for the purpose of carrying on commerce between the hostile countries, is void, unless, by treaty or understanding between the warring countries, such agreements are to be allowed.

# **QUESTIONS**

I. What persons are competent to enter into a valid contract?

II. Classify persons mentally deficient.

III. Define insanity as applicable to the law of contracts.

IV. Define the following terms: void, voidable, neces-

sary.

- V. Will the executory contract of one judicially declared to be insane be enforced? Will the executory contract of one not judicially declared to be insane be enforced?
- VI. Allen knew that Baker was insane. Allen made a contract with Baker, which was perfectly fair in every way. Shortly afterwards the court appointed a guardian for Baker, and the guardian brought suit on behalf of Baker to set aside the
- (10) A foreigner, as the term is here used, is a person who is a citizen of, or owes allegiance to, some country other than the United States. For example, Allen, a citizen of England and residing in Missouri, is a foreigner in Missouri.

contract with Allen. Can he recover? If not, why not?

VII. How are the contracts of drunkards regarded?

VIII. Define the term "infant," and state when an infant becomes of age.

IX. State which contracts, if any, of an infant are bind-

ing

X. What are necessaries? Are executory contracts of an infant for necessaries binding on him?

XI. Allen, an infant, was badly in need of clothing.

He ordered two suits from Baker, a tailor, and agreed to pay one hundred dollars for each suit.

This price was twice as much as he should have paid for the suits. In an action at law by Baker against Allen for two hundred dollars can Baker recover? Why?

XII. Give an original illustration of the affirmance and of the disaffirmance of a contract by an infant.

XIII. When may an infant ratify his contracts? When disaffirm?

XIV. Allen, an infant of seventeen years, sold ten acres of land in Cook County, Illinois, to Baker for one thousand dollars. When Allen became nineteen years of age he decided he would disaffirm this sale, and he thereupon notified Baker of his disaffirmance. Is this action of Allen binding on Baker, and can Allen procure the aid of the courts to uphold him in this disaffirmance?

XV. In what manner must disaffirmance and ratification

be made?

XVI. Suppose an infant has squandered the money which he has received as the result of a contract.

Will this prevent his disaffirmance of the contract after he reaches his majority?

XVII. What rights did a married woman have at Common Law? What rights has she under the

statutes of your State?

XVIII. What is a corporation?

XIX. Classify and define the powers of a corporation.

XX. State the law in regard to the contractual rights of foreigners.

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# CHAPTER VI

## AN AGREEMENT

#### OUTLINE

AN AGREEMENT

I. Two or More Parties Necessary
 II. Must Act with a View of Alter-Serious Intention to be Bounding Their Legal Relations
 Business Transaction

1) There Must Be a Definite Offer

- 2) There Must Be a Definite Subject-matter 3) The Offer Must Be Communicated
- 4) There Must Be a Definite Acceptance
  5) The Acceptance Must Be Communicated
- III. Offer and 6) Silence Cannot Be Imposed as Indication of Acceptance
  - 7) The Prescribed Agency Should Be Used
     8) The Same Agency as that Used by the Offerer Should Be Used
  - 9) The Offer May Be Varied Before Acceptance
    10) The Offeree Must Have Notice, either Express or
    Implied of Revocation
- § 52. An agreement defined
- § 53. Two or more parties
- § 54. Legal rights and obligations
- § 55. Serious intention to enter into contract
- § 56. Business transactions
- § 57. Offer and acceptance
- § 58. Rules in regard to offer and acceptance
- § 59. Contracts created by law
- § 52. An Agreement Defined.— The second essential of every binding contract, except those created or implied by law, is an agreement. An agreement may be said to be the expression by two or more parties of a common intention to do or not to do some particular thing, with the view of altering their legal rights and obligations.
- § 53. Two or More Parties.— To create an agreement there must be two or more parties. By parties is meant either human beings, partnerships, stock companies, or cor-

porations, and by two or more it is indicated that a party can not contract with himself. It would at first glance seem to be perfectly obvious that it requires two or more parties before an agreement could be created, yet cases have arisen involving this very question.

#### **EXAMPLE:**

Allen was appointed by the court as administrator,—one who is to care for and properly distribute the estate of a dead person—of the property of Baker. Allen as an administrator requested Allen (himself) as an individual to do certain work for a certain sum of money. Allen as an individual promised to do the work. Here an agreement was lacking, and, therefore, no valid contract was created.

§ 54. Legal Rights and Obligations.— In the definition of an agreement it is said that the expressed intention of the parties must be "with a view of altering their legal rights and obligations." This is designed to call attention to the following rules:

(1) In order to create an agreement the transaction must take place under conditions indicating a serious inten-

tion to become bound.

(2) In order to create an agreement the transaction must have reference to a *business* (using the word in its broad signification) as opposed to a mere *pleasure* affair.

§ 55. Serious Intention to Enter Into Contract.—Under this heading it must be noted that the parties must seriously intend to become bound. From a transaction entered into by both parties as a jest an agreement will not be created. If, however, one of the parties is in earnest and honestly believes the other to be so, an agreement will be deemed to have been made. And it may be said that it is a dangerous proceeding to enter into contractual relations in jest, since unexpected results may ensue.

## **EXAMPLES:**

1. Allen, Miss Baker, and a number of friends had just returned to Jersey City after a pleasure trip to the country. Carter, a Justice

of the Peace, was also one of the party. Purely as a joke, Allen dared Miss Baker to marry him and purely as a joke Miss Baker accepted the dare. Carter performed the ceremony. Allen and Miss Baker never lived together as husband and wife. Allen sued to have the marriage annulled. The court held that, as the entire affair was a joke, there was in reality no marriage. An "agreement" was absent. McClurg v. Terry, 21 N. J. Equity 225.

- 2. Baker, as a joke, offered to pay Allen \$100 for a particular colt as soon as the colt gave certain signs of being healthy. But Baker assumed a serious expression when he made the offer and Allen thought that he (Baker) was in earnest. When the colt answered the condition imposed by Baker, Allen asked for the \$100. Baker refused and Allen sued. It was held that Allen could recover, for Baker had appeared to be in earnest and Allen actually was in earnest. McKinzie v. Stretch, 53 Ill. Appellate Reports 184.
- § 56. Business Transactions.— The law concerns itself with business as opposed to pleasure. If this were not true, there would be no end of litigation over trifling matters.

#### **EXAMPLE:**

Allen invited Baker and Carter to an elaborate course dinner to be given by him (Allen) in their honor on the following Monday. Baker and Carter agreed to come. Allen spent \$25 in having this dinner prepared. Baker and Carter did not appear at the time set for the dinner. Allen can legally do nothing to Baker or Carter. A contract had not been created, for the transaction was a mere social engagement. The law in such cases refused to recognize the creation of an agreement.

§ 57. Offer and Acceptance.— An agreement is created through an offer and an acceptance. An offer is a proposal made by one party called the offerer, to some other party, called the offeree, requesting such offeree to enter into a contract. An acceptance is the due manifestation by the offeree of his assent to the offer and of his consent to enter into the contract.

## **EXAMPLE:**

Allen said, "Mr. Baker, I will sell you this horse for \$100." (This was an offer made by Allen who was the offerer.) Baker re-

plied, "Mr. Allen, I will buy that horse from you for \$100." (This was an acceptance made by Baker, the offeree.)

- § 58. Rules in Regard to Offer and Acceptance.— There are a number of rules regulating the proper making of an offer and an acceptance. These rules will now be stated and discussed:
  - I. The offer must be definite and unreserved.

By this is meant that what is said should clearly be a definite offer and not merely a vague conversation, nor a statement of past conditions.

#### **EXAMPLES:**

- I. Allen said, "Baker, I should like to sell you my house." Baker replied, "How much do you want for it?" Allen responded, "About \$3,000 or \$4,000." Baker said, "I should probably be willing to give about such a sum for it." And nothing more was said. This does not create an agreement. The element of definiteness is lacking.
- 2. The Allen Manufacturing Company issued a catalog in which was printed, "We have been selling the Knox hat for \$3." Baker, a month later, sent an order to the Allen Company for one Knox hat and enclosed \$3. The Company returned the money with a statement that the Knox hat was then selling for \$4. Here Baker could do nothing there had not been a definite unreserved offer.
- 3. Allen wrote, "Mr. Baker, I will sell you 1,000 bbls. flour the price to be fixed by the market-price on Feb. 1st." Baker accepted. An agreement is present in this for, although the price was not definitely named, yet it was capable of being definitely ascertained by referring to the market reports of February 1st.
- 2. The subject-matter mentioned in the offer must be definite.

This means that the article or articles offered must not be indefinite, doubtful, or undetermined.

## **EXAMPLE:**

Allen promised Miss Baker that, if she would marry him, he would give her mother 100 acres of land. Miss Baker married Allen. He then refused to give the land. Here Allen is not bound as

the offer does not in any way indicate what land was referred to or where the land was located or its approximate value.

3. The offer must be communicated by the offerer to the offeree.

A person may harbor a secret intention to make an offer. He may even say that he is seriously contemplating making an offer but until he actually makes the offer and communicates it, he cannot be bound. Sometimes offers are made broadcast, however, as, for example, public offers of a reward with certain conditions attached thereto. In such instances, the offer is considered as being made to each person. If, however, a person gives information or complies with the conditions stated in the public offer without knowing that such a public offer exists, it is usually held that he cannot recover.

#### **EXAMPLES:**

I. Allen said, "Baker, I am going to have a new barn put up on my lot, and I think I shall give Carter the contract." Baker told Carter what Allen said, and Carter on the strength of this bought a large quantity of lumber. Allen then decided to give the contract for the erection of the barn to Dayton. Carter sued Allen. He cannot recover for (1) there was no definite offer, and (2) the offer was not communicated.

2. Allen said, "I will give \$1,000 to any man who will save my trunk and its contents from that burning building." Baker heard the offer and then saved the trunk and its contents but Allen refused to pay. The court held that the offer was made to the public and that, as Baker had complied with the terms thereof, he could re-

cover. Reif v. Paige, 55 Wis. 496.

3. On October 14th, the proper officer of a county offered a reward of \$200 to any person who would give such information as would lead to the apprehension and conviction of an unknown murderer. It had so happened, however, that, on October 11th, one Allen had given such information which, it later developed, led to the apprehension and conviction of the murderer. Allen claimed the reward but was refused it. The court held that Allen could not recover. There had been no offer and acceptance, for, when Allen gave the information, he knew nothing of the offer. Fitch v. Snedaker, 38 N. Y. 248.

4. The acceptance must be (1) definite, (2) absolute,

and (3) unconditional.

(1) The acceptance must be definite, for from vague phrases the courts will imply no agreement. The courts may come to the aid of parties in interpreting contracts which have more or less ambiguity, but, if the parties have themselves never come to any definite terms or to any terms definitely ascertainable, the courts cannot create such terms.

(2) The acceptance must be absolute, that is, identical with the terms of the offer. If the offerer makes a proposi-

tion, then the offeree must accept what is proposed.

(3) The acceptance must be unconditional and unqualified; i. e., the offeree must impose no new conditions or qualifications on the terms of the offerer.

#### **EXAMPLES:**

- 1. Allen said, "Baker, I should like to sell you my farm." Baker replied, "What will you take for it?" Allen answered, "I will sell it to you for \$5,000." Baker responded, "Well, I probably should be willing to give you \$4,000 or \$5,000 for it." Here no contract was made. The acceptance has been too vague and indefinite.
- 2. Allen offered to sell Baker 100 bushels of oats at 50c per bushel. Baker replied, "I will take 900 bushels at 50c." Here no contract was made. An agreement was lacking, for the acceptance was not identical with the offer.

If, after Baker made the above-stated counter-proposition and was refused by Allen, he (Baker) then decided to accept the original offer, he could not do so unless Allen consented. By making a counter-proposition, Baker is held to have rejected the original offer and a new offer must be made before he can accept.

- 3. Allen wrote Baker, "I will sell you 1,000 bushels of oats at 50c per bushel." Baker replied, "I will buy of you the 1,000 bushels of oats at 50c per bushel under the condition that I am not to pay for them for 6 months." This was not a good acceptance for, notwithstanding that the acceptance was co-extensive with the offer, the one accepting has attached a condition not present in the offer.
  - 5. The acceptance of the offer must be communicated. It is not sufficient that the offeree merely harbor a secret

intention to accept the offer. He must actually accept, and must communicate his acceptance. But the acceptance may be either by words or by conduct; although it is decidedly preferable, in order to avoid litigation, that words of acceptance be used. It must be noted in this connection, however, that the acceptance in some cases is ordinarily fulfilled by the doing of certain acts; and in such cases, the deed is considered a sufficient acceptance and communication.

#### **EXAMPLES:**

1. Allen was conducting negotiations with Baker in regard to the fitting up of a certain suite of offices. Baker furnished Allen with an estimate of the cost of the work but they did not conclude an agreement. Allen then wrote Baker as follows:

New York, September 29th.

"Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date you can begin at once."

(Signed) ALLEN.

By this, Allen meant: upon our making a formal contract in which you agree to finish the fitting up of offices at 57 Broadway within two weeks from date, and I agree to pay you a definite sum of money for your work, you may then immediately set to work to fulfill the formal contract.

Immediately on receipt of this note Baker bought a quantity of lumber. But Baker did not communicate his acceptance and Allen, knowing nothing of it, wrote Baker the next day and withdrew the offer. Baker sued for damages. The court held that Baker could not recover. The court said, "In the case in hand the plaintiff (Baker) determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which, in itself is no indication of an acceptance, become such, because accompanied by an unevinced mental determination."

2. The case, previously mentioned, in which Allen offered \$1,000 to anyone who would save his trunk and Baker saved the trunk, illustrates the acceptance by conduct. So also in the case of rewards offered to persons capturing criminals, the acceptance is usually indicated by the capture.

3. The following case also illustrates how an acceptance by conduct or acts may be perfectly binding especially if this is the custom

in the state where the delivery takes place. Allen ordered a machine to be delivered at St. Louis on or before July 1, 1897. The company did not communicate its acceptance but it delivered the machine at St. Louis before July 1, 1897, and Allen had not countermanded the order in the interim. When the machine arrived, Allen refused to accept it. In an action brought by the Company for the price of the machine, it was held that Allen was liable. McCormick Co. v. Markert, 107 Iowa 340.

6. Silence cannot be imposed by the offerer upon the offeree as an indication of communication of acceptance.

By this is meant that the offerer cannot compel an offeree to be bound by a contract simply because the offeree refuses to answer a communication.

#### **EXAMPLE:**

Allen wrote Baker, "I will sell you my gray horse for \$150. If I do not hear from you in five days, I shall consider you to have accepted this offer." Baker did not reply to Allen's letter. Allen now sues Baker for breach of contract for failure to take and pay for the horse. Allen cannot recover. Baker is under no legal obligation to answer Allen's correspondence.

7. If the offer indicates an agency through which the offeree should signify his acceptance then it is advisable to use the prescribed agency.

## **EXAMPLE:**

Allen wires Baker, "Will sell you 1,000 bushels of oats at 50c per bushel. Please write me within the next two days if you will accept." Here Baker, if he wishes to accept, should write Allen to that effect within the time mentioned. Should Baker decide, however, to accept and should he wire, instead of writing his acceptance, and should that acceptance reach Allen before he (Allen) withdraws the offer then said acceptance is binding. But it is advisable for Baker to do as Allen requested, for if he writes, as directed, then the moment the letter is posted in the box, whether Allen gets it or not, an "agreement" is reached, for Baker used the method of communication prescribed in the offer. In the case of his wiring his answer, however, inasmuch as he used a different agency than that requested, it is held by the weight of authority that an "agreement" is not created until the acceptance reaches the offerer, and if the of-

ferer had, at any time before receiving the acceptance, withdrawn the offer, there would have been no valid contract.

8. If no particular agency is indicated, then it is advisable to use the same agency through which to communicate the acceptance as the offerer uses in sending the offer.

If the offeree uses the same agency as is used by the offerer, then the agreement is concluded the moment the notification of the acceptance is placed in the possession of the agency, and, from that moment on, revocation by either party becomes impossible. But the weight of authority is to the effect that if a different agency is used, then an agreement is not reached until the acceptance reaches the offerer and either party may at any time in the interim, that is, between the sending of the offer and the receipt of the acceptance, revoke what he has done and thus render the acceptance of no effect.

#### **EXAMPLES:**

I. Allen wrote Baker making an offer to sell 100 bushels of wheat at \$1 per bushel. Baker immediately posted a letter containing a notice of his acceptance. The letter of acceptance never reached Allen. The court held that Allen had impliedly authorized Baker to use the mails as he (Allen) had used that agency; that, therefore, an agreement was created upon the posting of the letter; and that from that moment neither party could escape from the contract without the other party's consent. Washburn v. Fletcher, 42 Wis. 152.

2. Allen wrote Baker: "Will sell you 10,000 feet of lumber at 10c per foot." Baker immediately wired to Allen accepting the offer. The telegram miscarried. Here by the better rule an agreement was not reached. Baker used his own agency and not that impliedly indicated by Allen. (There are some cases, however, which hold that if the offeree telegraphs an acceptance to a letter, the agreement is reached on depositing the telegram with the telegraph company. These cases proceed on the theory that an offerer who uses a letter to make an offer impliedly authorizes the use of either a letter or a telegram to accept the same.)

3. Again Allen wired Baker, "Will sell you 10,000 feet of lumber at 10c per foot." And Baker immediately wrote a letter of acceptance. Before the letter of acceptance reached its destination,

Allen got a chance to sell the lumber at 12c per foot, so Allen immediately wired Baker, "I withdraw my offer to sell you 1,000 feet of lumber at 10c per foot." Three hours later and after Baker received notice of the revocation Allen received the letter of acceptance from Baker. Here Allen was not bound by his first offer. He withdrew his offer before the acceptance reached him and, inasmuch as Baker did not use the agency that he was impliedly authorized to use, the offer could be revoked at any time before the offerer received the acceptance. (This case also differs from the preceding one in that the original offer was by wire which is an implied notice that the offerer expects an immediate answer by the same quick instrumentality.)

- 4. Allen wired Baker, "I will sell you 1,000 pairs of Corbett shoes at \$2 per pair." Baker wrote a letter of acceptance immediately. Before the letter reached Allen, Baker repented and decided to withdraw his acceptance. He, therefore, wired Allen, "I refuse the offer contained in your recent wire. Should you receive a letter of acceptance from me you will understand that same is to be treated invalid." This, Baker can do, inasmuch as an agreement was not reached until Baker's letter reached Allen, for Baker had used a different agency than that impliedly indicated by the offer.
- 5. Allen wired Baker, "I will sell you 100 Cleopatra pianos at \$400 a piano." Baker wired his acceptance, which message went astray. Baker then wired refusing the offer; and his second wire was received. Baker is nevertheless bound by the first telegram he sent which was an acceptance; for, since he (Baker) used the agency impliedly indicated by the offer an agreement was reached upon the depositing of the acceptance in the hands of the telegraph company.

9. An offer may be varied or withdrawn at any time before the offer is legally accepted.

Under Rules 7 and 8 we have incidentally considered when the offer is legally accepted. We have also mentioned in the examples given there something of the revocation of an offer. It only remains for us here, therefore, to restate that rule briefly and to say a word about the situation where a consideration is paid to keep an offer open. An offer

(1) Consideration will be defined and treated in detail in a later section of this work. For the present it will suffice to say that it is anything of value, including services to be received by the party making the promise or any detriment suffered by the party to whom the promise is made.

is legally accepted when the acceptance reaches the offerer unless the offeree uses, in communicating the acceptance, the agency indicated either expressly or impliedly by the offerer, in which latter instance an agreement is reached when the acceptance is deposited with such agency. Until the offer is accepted legally, the offerer has the legal right to vary terms of the offer or to revoke the offer entirely.

It sometimes occurs that an offerer promises to keep an offer open for a definite length of time. But, notwithstanding this promise, he may alter or revoke the terms of the offer before acceptance, unless the offeree has given some consideration for holding the offer open. But when the offeree has given some consideration, there is then existing what is known as an option, which is, in fact, a contract in itself. The offer cannot then be legally altered or withdrawn until the time for which the option exists expires. So also if the promise to hold the offer open is written and has a seal 2 attached to it, by the common law — that which came from England — the offer cannot be altered or withdrawn until the time specified has expired. But in a number of the states the seal has lost much of its common law importance and no longer is viewed as an equivalent of a consideration.

#### **EXAMPLE:**

Allen sent his office boy over to Baker's with a note containing an offer to sell Baker 1,000 hats at \$2 a piece. Baker waited half an hour and then posted a special delivery letter accepting the offer. Meanwhile, Allen changed his mind and, before he received Baker's acceptance, sent the boy over to Baker's a second time, this time with a note revoking the offer. Baker now seeks to hold Allen to the original offer. Baker can not hold Allen as Baker used a different agency to communicate his acceptance and therefore an agreement was not reached until the acceptance reached Allen, and meanwhile Allen had the legal right to withdraw the offer.

(2) Seal has been mentioned previously. It will be treated more in detail under consideration. To recall it briefly to mind, it consisted originally of a piece of wax stamped with a coat of arms or signet. Today a scrawl with the word seal in it is sufficient.

10. An offeree must have notice of the revocation of an offer, except in those cases in which the offer expires by

reason of express or implied conditions.

If a period of time is fixed upon during which it is agreed that the offer shall remain open, and if nothing is done by either party until that period of time has expired, then the offeree has lost his opportunity of accepting the offer. If no special period of time is fixed during which the offer should remain open, then the offeree has a reasonable time during which he may accept; and what is a reasonable time can not be fixed by any rule. The circumstances surrounding the case are usually the controlling influence by which the court or jury is enabled to reach a conclusion.

If the offerer agrees to hold open an offer for a definite length of time but no consideration is paid him, then, as we have said previously, he may alter or withdraw his offer

before its acceptance.

#### **EXAMPLES:**

- 1. Allen wrote, "Baker, I will sell you 400 Chattanooga boats at \$40 a piece." Baker considered the offer for a day. He then posted his letter of acceptance. Five minutes later Baker received a telegram revoking the offer. Baker may hold Allen to the agreement. The acceptance was legally effective before the notice of withdrawal was received.
- 2. Allen offered to sell Baker his only horse for \$100, and Allen promised, without consideration, to hold the offer open five days. On the third day Allen sold the horse to Carter for \$125. Carter notified Baker that he (Carter) had bought Allen's horse. On the fourth day Baker notified Allen that he (Baker) accepted Allen's original offer. Baker cannot hold Allen, for Baker knew when he made the acceptance that Allen had sold the horse to Carter. By selling the horse to Carter, Allen revoked his offer to Baker and Baker had notification of the revocation through Carter, for revocation may take place by words or conduct. And the fact that the notice of the revocation came through a third party made no difference so long as it was authentic and actually reached the offeree before he accepted the offer.
- 3. Allen agreed with Baker that an offer should remain open two days. Three days afterwards Baker tried to accept the offer. He

could not legally do so. The offer expired at the end of the second day.

- 4. On January 1st Allen offered Baker a horse for \$100. Both parties lived in St. Louis. On March 1st Baker tried to accept the offer. He could not legally do so. This surely would not be held to be a reasonable time in which to accept if the parties live within the same state, provided nothing was said of the length of time the offer should remain open.
- 5. On January 1st Allen wrote Baker, "Will sell you my farm for \$1,000." On January 2nd Allen died. On January 3d, Baker, not knowing of Allen's death, accepted the offer in a letter. Baker could not hold Allen's estate, because the death of Allen revoked the offer, and the whole world is conclusively presumed to have notice of the death.
- § 59. Contracts Created by Law.— We have thus far in this chapter considered what an agreement is and how it is reached. It has been impliedly indicated that an agreement is not an essential of a contract created by law, and this is indeed true. In order, however, to satisfy that requirement of a contract; namely, that there be an agreement the rule exists that in contracts created by law, it is legally presumed that the parties have expressed a common intention, and no evidence may be introduced to dispute this presumption.

## **EXAMPLE:**

Allen unlawfully deserted his wife and did not supply her with the necessaries of life. Mrs. Allen got groceries from Baker in order to sustain her life. Here Allen is conclusively presumed to have agreed to pay the reasonable value of the groceries, notwithstanding that he (Allen) had told Baker not to supply the groceries. The law creates the contract.

## **QUESTIONS**

- I. What is the second essential of every binding contract? Is this essential present in contracts created or implied by law?
- II. How many parties must there be to an agreement?
  Allen, who was the only member of the Allen

Corporation, contracted to sell to Allen (himself) all the property of the corporation at an unreasonably low figure, thereby prejudicing the rights of creditors (i. e., the persons to whom the Allen Corporation owe money). The creditors of the Allen Corporation brought suit to have the contract which the Allen Corporation made with Allen set aside. Decide the case.

III. How is an agreement created? Define the terms "offer" and "acceptance." Give illustrations of both.

IV. To what general character of events must a transaction have reference in order to create an agreement? Under what conditions must a transaction take place in order to create an

agreement?

V. Allen promised that he would take Baker to a baseball game on Monday afternoon at 2 P. M. Allen told Baker that he would meet him at Vandeventer and Finney Avenues at 1:30 P. M. For no good cause, Allen did not keep his promise. Through the fact that Baker was absent from his office at the time indicated, Baker failed to close a very important contract which would have netted him \$2,000 profit. Can Baker recover from Allen for his (Allen's) failure to keep his promise?

VI. In the presence of friends who were having a merry time, Allen in sport offered to buy a horse from Baker. Baker agreed to sell Allen the horse. Both parties were only joking. Allen is attempting to hold Baker to the contract.

Can he do so? If so, why?

VII. Allen wrote Baker, "I should be willing to pay you \$100 to refloor my barn." Baker did not answer Allen's letter, but proceeded to buy lumber with the intention of reflooring Allen's barn. Inasmuch as Allen received no answer from Baker he supposed that Baker did not care for the job and he (Allen) made a contract with Carter to do the work. Baker sued Allen for damages. Decide the case, giving reasons.

VIII. State all the rules governing an offer and an ac-

ceptance.

IX. The Allen Company sent out a printed circular saying, "We are selling fireless cookers for \$5 a piece." Baker wrote the Allen Company a letter ordering one of the fireless cookers. The Allen Company immediately wrote Baker that they would not fill his order. Baker now sues the Allen Company for damages. Can he recover? Why?

X. Allen agreed to sell Baker one hundred boxes for \$50. Baker accepts the offer. Nothing was said as to what boxes were referred to in the

offer. Was this an agreement?

XI. Allen, who was a sheriff of Chattanooga County, offered to give \$1,000 to any person who would give information leading to the arrest of Baker, a criminal. Carter read the offer and then, hearing where Baker was, notified the sheriff of the criminal's whereabouts. The sheriff, as a result of this information, was enabled to capture Baker. Carter demanded the reward but Allen refused to pay on the ground that it was the duty of every good citizen to tell where a criminal was in hiding. Carter sues Allen. Can he recover? Why?

XII. Give an example of an indefinite offer and accept-

ance.

Allen offered to sell Baker one hundred Columbia pianos at \$500 each. Baker immediately replied, "I will take the hundred pianos at \$450 each." Was an agreement made?

State reason for your answer.

XIII. Allen wrote Baker, "I will sell you one hundred Columbia pianos at \$500 per piano." Baker replied, "I accept your offer, said pianos to be paid for in stock of the Carter Company." Was this an agreement? If not, why not?

XIV. What have you to say in regard to the rule that the acceptance of an offer must be communi-

cated? Illustrate this rule.

XV. Allen advertised that he would pay a reward of \$50 to any person who had found and would return to him a valuable manuscript he had lost. Baker found the manuscript and returned it to Allen, who refused to pay the money. Considering the matter merely with reference to the rule that an acceptance should be communicated, could Baker recover the \$50? State reason for your answer.

XVI. Do you think the rule reasonable that silence can not be imposed by the offerer upon the offeree as an indication of the offeree's acceptance? If not, state reasons. Give an illustration of

this rule.

XVII. If an offerer indicates a particular agency through which to signify your acceptance, must you use this agency? Suppose you use a different agency, will this prevent the parties from making a binding agreement?

XVIII. Suppose no particular agency is prescribed to be used, then what agency is it most advisable to

use?

XIX. Allen wrote Baker, "I will sell you one thousand bushels of oats at 50 cents per bushel. Offer to remain open three days." Baker wired his acceptance of the contract, which wire Allen never received. After three days Allen sold

the oats to Carter. Baker now demands that Allen ship him the oats. Allen refuses and Baker brings suit. Decide the case, giving reasons. Give an illustration showing the advisability of using the same agency that the offerer has used, provided no particular agency has been prescribed.

XX. Allen wrote Baker, "Will sell you 500 Cleopatra pianos at \$200 per piano. Offer to remain open four days." Just after Baker received this letter and before he had communicated his acceptance, he received a wire from Allen withdrawing the offer. Then Baker wrote a letter to Allen accepting the offer. Did this constitute an agreement?

XXI. Suppose Baker in the preceding case had paid Allen \$10 to keep this offer open for four days. If Allen then withdrew the offer as he did in the preceding case, could Baker recover dam-

ages?

- XXII. Allen wrote Baker, "Will sell you 500 Condon desks at \$40 per desk. Offer to remain open two days." Allen then, before the expiration of the two days, and without notifying Baker, sold the 500 desks previously mentioned, to Carter. Before the time limit made in the offer had expired Baker accepted Allen's original offer. Was there an agreement made in this case between Allen and Baker? If not, state reason.
- XXIII. Allen offered to sell Baker two Condon desks for \$50, offer to remain open two days. Before the second day had expired Allen sold the two desks to Carter, and Carter notified Baker that he had purchased the desks in question. Baker then accepted Allen's original offer. Has an agreement been created between Allen and Baker?

XXIV. Allen offered to sell Baker his piano for \$300.

One year later Baker notified Allen of his acceptance of Allen's offer made the preceding year. Allen refused to abide by the terms of that offer. Could Baker hold Allen to the offer? If not, state reasons. Discuss the rule underlying your decision of this case.

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## CHAPTER VII

# REALITY OF CONSENT

# OUTLINE I. Mistake { Unilateral | Law | Mutual | Fact | Subject-Matter | Existence | Identity | II. Misrepresentation { Innocent | Fraudulent | III. Undue Influence | IV. Duress | Force | Imprisonment | Threats

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- § 60. Reality of consent necessary
- § 61. Presumption of reality of consent
- § 62. How to prove absence of reality of consent

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§ 60. Reality of Consent Necessary.— We have noted that the second essential of every binding contract is the "agreement" and that the "agreement" takes place through an offer and acceptance. It now becomes necessary to call attention to the fact that this offer and acceptance must be something more than a mere formal statement of words. It is not sufficient that Allen should say to Baker, "I will sell you this hat for \$3," and that Baker should answer, "I accept your offer." There is a third element necessary; namely, reality of consent. Not only must Baker say, "I accept your offer," but when he says it his mind must be in perfect accord with that of Allen's. Suppose, for example, that Carter is standing by Baker and threatens to kill Baker if he does not say the words. Here Baker will have concluded an agreement and yet he will not be bound, for his consent was only superficial, not real. It is then necessary that there should be "real" consent, on the part of both parties, to enter into the contract. Whenever that consent is lacking there is no valid contract.

§ 61. Presumption of Reality of Consent.— If a contract made in due form is proved, however, there is an inference that the real consent of parties was given. If either party has not given such consent it then becomes necessary for him to prove that fact, provided he does not wish to be

bound by the contract.

§ 62. How to Prove Absence of Reality of Consent.— The lack of this real consent may be proved by showing any one of the following things:

That there has been a mutual mistake Section I.

That there has been an innocent misrepre-Section II. sentation

Section III That there has been a fraudulent misrepresentation

That undue influence has been exerted Section IV.

Section V. That duress has been used

We shall now consider these five subjects.

## SECTION I

#### Mistake

- § 63. Definition.— A mistake is an error, a misunderstanding, a misconception, or a misapprehension. "A mistake exists when a person under some erroneous conviction of law or fact, does, or omits to do, some act which, but for the erroneous conviction, he would not have done or omitted." a
- § 64. Folly or Negligence Not Considered Mistake.— It is no defense to an action on a contract for one to assert that it was folly on his part for him to have entered into the contract. So also a defense by a party that he was negligent, in signing a contract without reading it, will ordinarily have no efficacy. Although it is often said in common parlance in both of these cases that the party made a mistake, in the eyes of the law his act will not be considered a mistake and he will be bound by his contract.
- § 65. Unilateral and Bilateral Mistakes.— A mistake is either "unilateral;" i. e., a misconception by one party only or bilateral, more commonly called "mutual"; i. e., a misapprehension on both sides. The general rule may be said to be that unilateral mistakes will not be considered sufficient grounds to make a contract invalid. Therefore, in the following discussion we shall consider only mutual mis-
- takes.
  - § 66. Mistakes of Law and Fact.—It must be noted
  - (a) Black's Law Dictionary: Mistake.

further that a mistake or misconception may exist in regard to what the law is or what the facts are on a given matter. "A mistake of law happens when a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect." "A mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake and consists either in an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or in a belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed." "

- § 67. Rule Governing Mistakes of Law.— Generally speaking, a mistake of law, like a unilateral mistake, will not be sufficient grounds to render a contract invalid.¹ In the case of Hunt v. Rousmanier's Administrator, d the Supreme Court of the United States held that a mistake arising from ignorance of law is no ground for reforming a deed founded on such a mistake. Again we find in the case of Trigg v. Read the statement: "Ignorance of the law, however plain and settled the principles may be, and a consequent mistake founded upon such ignorance furnishes no ground to rescind agreements or to set aside solemn acts of the parties, when they have been made with a full knowledge of the facts, unless they be tainted by imposition, misrepresentation, undue influence, or misplaced confidence, or suspicion."
- § 68. Mutual Mistakes of Fact Classified.— Having considered mistakes of law, we next must touch upon mistakes of fact; and the student must bear in mind that we are considering only bilateral or mutual mistakes. These mutual mistakes of fact will be considered in reference (A) to

<sup>(1)</sup> There are some exceptions to the general rule in Equity, but the limitations of this work preclude a discussion thereof.

<sup>(</sup>b) Black's Law Dictionary: Mistake.

<sup>(</sup>c) Civil Code California, § 1577.

<sup>(</sup>d) 1 Pet. (U. S.) 15.

<sup>(</sup>e) 5 Humphreys (Tenn.) 529, l. c. 535.

the subject-matter of the contract and (B) to the price to be paid. (A) Bilateral mistakes in regard to the subject-matter of the contract may refer either to the existence of the subject-matter or to its identity.

# (A) Mutual Mistakes Referring to the Subject-Matter.

§ 69. Existence of the Subject-Matter.— When we speak of mutual mistakes involving the existence of the subject-matter of the contract we mean that both parties believed that the subject-matter of the agreement was in existence at the time the agreement was made when, in fact, it was not in existence.

#### **EXAMPLES:**

- I. Allen owned a cow. He invited Baker to examine the cow, which Baker did. A month after this examination Allen sent the cow out to a pasture. On the road to the pasture the cow was killed. Allen was not informed of the death. It so happened that the next day after the cow was sent to the pasture, Baker met Allen and after some little bargaining Allen sold Baker the cow for \$75, which amount Baker paid Allen. When Baker went to the pasture to get the cow he found that the cow had been killed previous to the so-called sale. Baker may recover the \$75 for the reason that the subject-matter of the sale; i. e., the live cow, was not in existence; i. e., alive at the time of the sale, hence there was no contract.
- 2. Allen owned a ship that was sailing on the high seas. Allen sold the ship on May 21, 1908, to Baker for \$50,000. It developed later that the ship had sunk on May 10, 1908, and that neither party knew this when the contract of sale was made. Neither party is bound. Baker may recover his \$50,000 if he had paid it. No contract was made for there was a mutual mistake as to the existence of the subject-matter. In a similar English case the Lord Chancellor said, "The contract plainly imports that there was something which was to be sold at the time of the contract and something to be purchased. No such thing existing, the Court of Exchequer Chamber has come to the only reasonable conclusion." The conclusion referred to was that the purchaser need not pay for the article, for no valid contract had been made. Couturier v. Hastie, 5 House Lords Cases 673, 1. c. 681.

§ 70. Identity of the Subject-Matter.— A mutual mistake in regard to the identity of the subject-matter exists in those cases in which the seller is referring to one article and the buyer to another. Inasmuch as their minds are not in perfect accord as to any specific article there is no valid contract.

#### **EXAMPLES:**

I. Allen said to Baker, "I will sell you 'Nellie' for \$100." Baker said, "I accept your offer." Later it developed that Allen was referring to a horse named "Nellie" (which Allen owned) and Baker was referring to a cow named "Nellie" (which Allen owned). Neither party would be bound by this contract. There was a mutual mistake as to the identity of the subject-matter.

2. Allen made the following offer to Baker: "I will sell you 125 bales of Surat Cotton, same to arrive by the ship Peerless from Bombay." Baker accepted the offer. Later Allen tendered Baker the cotton, which Baker refused to accept. In a suit for damages by Allen against Baker it was shown that there were two ships named "Peerless," both sailing from Bombay, and that one ship sailed in October and another in December. Baker was referring to the cotton on the October ship and Allen was referring to that on the December ship. The court held that no contract had been made. Raffles v. Wichelhaus, 2 Hurlstone and Coltman's Reports 906.

# (B) Mutual Mistakes Referring to the Price

§ 71. Invalidates Contracts.— If there is a mutual mistake as to the price to be paid, then no valid contract will be legally made.

## EXAMPLE:

Allen, a Frenchman, who did not understand the English language very well, attended an auction in New York. Allen bid on an article and same was called out as sold to him. It developed later that Allen thought he was bidding 100 francs (\$25) and that the auctioneer thought Allen was bidding \$100. Allen would not be bound by the bid nor would the auctioneer be bound. There was a mutual mistake as to price.

## **QUESTIONS**

- I. What is the third element of every valid contract? Illustrate.
- II. Name the five ways in which the lack of this third element may be proved.
- III. Define the term mistake.
- IV. What is the general rule in regard to entering into a contract through error?
  - V. Classify mistakes in regard to number.
- VI. What is the effect on a contract of an unilateral mistake? Give an example of an unilateral mistake.
- VII. What is a mistake of law?
- VIII. What is the effect of a mistake of law?
  - IX. What is a mistake of fact? Illustrate.
  - X. What is meant by a mutual mistake involving the existence of the subject-matter? Illustrate.
  - XI. Allen sold Baker a house at 10 A. M., Jan. 20, 1909. Baker had not yet paid for the house. On January 21 Allen demanded the price agreed upon, but Baker refused to pay on the ground that the house had burned down at 10:30 A. M. on the same day of the sale. Decide the case.
- Allen found an uncut stone (a jewel) in an alley. Allen thought the stone was worthless. He showed the stone to Baker who was a groceryman and who knew nothing of the value of stones. Allen needed money, so he asked Baker to give him \$1 for the stone. Baker said he would take a chance and he gave Allen the dollar. The stone proved to be an uncut diamond worth \$750. Allen offered Baker the \$1 paid and 10 cents interest, and demanded the return of the stone on the ground that there was a mutual mistake as to the identity of the subject-matter. Decide the case and give reason.

XIII. What have you to say in regard to mutual mistake with reference to price? Illustrate.

# SECTIONS II AND III

Innocent and Fraudulent Misrepresentations

- § 72. Introductory.— The student has noted that the third essential of every binding contract is "Reality of Consent." It has also been said that the proof of the presence of Misrepresentation or Fraud might establish the absence (or lack) of Reality of Consent. We shall now discuss the subjects of Misrepresentation and Fraud or, more properly speaking, of Innocent and Fraudulent Misrepresentations, considered in their relations to contracts.
- § 73. Definition.— A representation is a statement by one of two contracting parties to the other, before or at the time of making the contract, in regard to some fact, circumstance, or state of facts relating to the contract. A misrepresentation is a representation which is false. An innocent misrepresentation is a false representation made by one who believed it to be true when he made it, and who did not make it in reckless disregard of the truth. A fraudulent misrepresentation is a false representation made by one who had knowledge of its falsity or who made the representation with reckless disregard of the truth.

## **EXAMPLES:**

- 1. Allen, a dealer in art supplies, represented a painting as coming from the brush of Leonardo da Vinci, a famous Italian. Allen honestly believed that what he said was true. He had reasonable grounds for his belief. Baker bought the painting on the strength of Allen's representation and paid \$5,000 for it. It later developed that the painting was not one of da Vinci's but had been executed
- (2) Inasmuch as there is some difference in usage among the better authorities as to whether the word "misrepresentation" unqualified, shall mean an innocent or a fraudulent misrepresentation, it has been decided always to use in this book the qualifying adjectives "innocent" or "fraudulent."
- (f) Cf. Black's Law Dictionary: Representation; also Bishop on Contracts, § 663.
  - (g) Black's Law Dictionary: Misrepresentation.

by one Petro, a comparatively unknown painter. Allen had made

an innocent misrepresentation.

- 2. Allen owned a house on Fifth Avenue, New York. He was trying to sell the house and in order to make the sale, he represented to Baker that a third party who had occupied the house during the preceding year and who was, at the time of the conversation, occupying the house, had paid a rental of \$200 per month. On the strength of this representation Baker bought the house. As a matter of fact, Allen knew that he had been receiving a rental of only \$100 per month. He, therefore, had made a fraudulent misrepresentation to Baker.
- § 74. Elements of Innocent and Fraudulent Misrepresentation.— It has not been deemed expedient to give all the elements of either an innocent or a fraudulent misrepresentation in the definition of those terms. To constitute an innocent misrepresentation the following elements must concur:

(1) The representation must have been false.

(2) The representation must have been in regard to a material fact, past or present.

(3) The representation must have been made by the

party charged with it (defendant) 3 or by his agent.

(4) The party making the representation (defendant) must have believed it to be true and must have had reasonable grounds for his belief.

(5) The representation must have been made with the intent that the other party (plaintiff) 4 should act on it.

(6) The representation must not have been obviously untrue.

(7) The representation must have been believed and relied upon by the plaintiff.

(8) The representation must have been at least one of the causes which induced the plaintiff to act.

(9) The plaintiff must have suffered damage as a result of relying and acting upon the representation.

(3) The term defendant is here used to indicate the defendant in a supposed suit; i. e., the party making the innocent misrepresentation.

(4) The term plaintiff indicates the plaintiff in a supposed suit; i. e., the one suffering as a result of the innocent misrepresentation.

- § 75. Innocent and Fraudulent Misrepresentation Differentiated.— Only in the fourth element, as here stated, does a fraudulent differ from an innocent misrepresentation. It was said under the fourth element enumerated in the foregoing that for a misrepresentation to be considered innocent the party making the representation must believe in its truth and must have reasonable grounds for his belief. It must now be noted that to maintain a charge that a misrepresentation is fraudulent the party making the representation must have known it was false or must have made it with reckless disregard of the truth.
- § 76. False Representation.— In order that one may be charged with either an innocent or a fraudulent misrepresentation it is necessary to prove that the representation was false when it was made. But the representation is deemed to be a continuing one from the time made up to the time when acted upon.

#### **EXAMPLE:**

Allen offered to sell Baker a plow which had been in use for one year. Allen represented that the plow was in good condition. Baker said, "I will let you know in three days whether I will accept your offer." Shortly after this conversation, and before Baker had notified Allen of what he would do, a team of horses (of Allen's) attached to the plow ran away and badly broke up the plow rendering it practically useless. Allen quickly had the plow put in such shape that the defects could not be seen. The next day Baker accepted Allen's offer. In such case, it was Allen's duty to notify Baker of the change in the condition of the plow. His (Allen's) representation that the plow was in good condition is deemed to have continued up to the time of the acceptance. If he does not notify Baker of the changed condition, he (Allen) is guilty of fraudulent misrepresentation.

§ 77. Material Fact.—The second element stated is that the representation must have been in regard to a material fact, past or present. This indicates that the representation must be material, that is, "it must have influenced and been a controlling reason for the transaction. Its

materiality is made to appear sufficiently, if in the judgment of a reasonable person the false statement was one of the reasons for acting." But what is a material fact must be left to the jury. It is not possible to lay down any hard and fast rule to test materiality. Each case must stand on its own merits.

Again, it should be said that the representation must be in regard to a fact and not in respect to a matter of law. (But this general rule is sometimes modified when the party making the statement is a skilled lawyer while the party with whom he is dealing is one ignorant of legal knowledge. In such cases a representation of a matter of law is put on the same plane as a representation of a fact.) The representation must also be given as a definite fact and not as a mere matter of opinion. And the student no doubt has observed that the material fact must be a past or present one. Statements as to what will happen in the future are considered to be mere opinions.

### **EXAMPLES:**

- 1. Allen, an agent procuring subscriptions for the capital stock of a corporation, represented that the subscribers would be liable only for a certain percentage of the face value of the stock. Baker, thereupon, subscribed for stock. Later the company wished to hold Baker for the full amount of the subscription. He did not want to pay, on the ground that it had been represented that he would not be liable for the entire amount. But Baker got the exact stock for which he had subscribed and the false representation as to his legal liability would therefore not constitute grounds to escape from such liability.
- 2. Allen, an attorney well versed in the law, was consulted by Baker, a young man of 22 years, in regard to whether the title to a piece of property was good. (Baker had never had anything to do with legal matters and, moreover, he had been very poorly educated.) The title to Baker's property was unquestionably a valid one. Allen, however, wished to get the piece of property; so he advised Baker that the title was no good and then he bought what title Baker had at an absurdly low figure. In such a case, inasmuch as a confidential relationship existed and as the young man "by reason of his ignorance and unfamiliarity with business, was compelled to rely and did

rely on the superior knowledge of the attorney" the representation, although in regard to a legal matter, would yet be viewed as on the same footing as a representation of fact. Lawson on Contracts, § \*235.

- 3. Allen, in selling a piece of land to Baker said, "I think you could raise a good crop of alfalfa hay on this land." Such a statement is merely an opinion, and, as a rule, "mere expressions of opinion, even though false, are not to be regarded as representations of fact. The question frequently arises upon statements as to value; they will usually be held to be mere expressions of opinions, for each party has an equal right and ought to form his own opinion. If, however, one has peculiar means of knowledge, as an expert, his false statement of value may be a fraud." Fishback on Elementary Law, § 371.
- 4. Allen was trying to sell a piece of land to Baker. In the course of the transaction Allen said, "I am positive that the Missouri Pacific Railway will build a branch line running near this land three months from now." Even though Allen knew his statement was without foundation in fact, still his statement would not be considered (either as innocent or) a fraudulent misrepresentation. It would be looked upon as an opinion concerning what would happen in the future.
- § 78. Representation, by Whom Made.— It is obvious that the representation must be made by the party to be charged or by his agent, that is, by a person duly authorized to act for the party sought to be charged.

### **EXAMPLE:**

Allen heard from Baker that there was a valuable mine located on Carter's ground. Allen bought Carter's ground only to discover that Baker had fraudulently deceived him. Nevertheless, as Carter had had nothing in any way to do with the representation, he can not be held responsible for Baker's acts.

§ 79. Knowledge of Party Making Representation.— The student's attention has already been directed to the difference between an innocent and a fraudulent misrepresentation. In the one case; i. e., innocent misrepresentation, the party believes that what he represents is true and has reasonable grounds for his belief. In the other; i. e., fraudulent misrepresentation, he knows that what he represents to be true is, in fact, false or he makes representations stating that they are true, when he does not know whether they are true or false.

#### **EXAMPLES:**

I. Allen, a retail dealer in plows, had been selling the Thompson brand of plows for ten years and had always found them to be satisfactory to his vendees. On a certain day Allen told Baker, a prospective customer, that a particular plow of the Thompson brand was A No. I. Baker bought the plow and found same entirely useless, due to the poor construction of the plow. Allen's statement was an innocent misrepresentation. He had based his opinion on ten years' selling of the Thompson brand of plows.

2. Allen was bargaining with Baker, both citizens of the United States, for the purchase of 10,000 pairs of shoes. There was a war going on between Russia and Japan. The price of shoes would be much higher if the war was still continuing. The newspapers had given no definite information as to whether the war had or had not been settled. In order to buy the shoes more cheaply, Allen definitely represented to Baker that the war was settled. As a matter of fact, Allen did not know whether the war had or had not been settled. On the strength of Allen's representation Baker sold Allen the shoes at the lower figure. Later on it developed that the war had not been settled. Allen was guilty of a fraudulent misrepresentation. He had made the statement in reckless disregard of its truth or falsity. And since it was, in fact, false, he is considered to have made it wilfully. (It might be said here that some few states do not uphold this view. In such states a reckless statement which is false is called an innocent misrepresentation.)

3. Allen stated falsely in the course of bargaining that a house had cost him \$3,000 when, as a matter of fact, the house only cost him \$2,000. Such a statement was a fraudulent misrepresentation. It should be noted here that there is a decided difference between saying that an article cost you \$3,000 and that it is worth \$3,000. In the former case if your statement is false you have made a fraudulent misrepresentation. In the latter case you merely express an opinion for the falsity of which you cannot be held.

§ 80. Intent.— The fifth element is said to be that the representation must be made with the intent that the other

party should act on it. The reader should observe that it had advisedly not been said that the representation must be made to the other party. A statement may be made to one party with the request that he communicate it to his friends or to some particular party, and in such case the party that acts upon the representation is in the same position as if the representation were made to him in person.

#### **EXAMPLES:**

- Allen made a representation to a commercial agency that he was worth \$50,000. He made the representation knowing that the Commercial Agency would give such information to their subscribers. As a matter of fact, Allen was only worth \$1,000. Baker sold Allen goods on the strength of the representation. The court, in deciding the case, quoted the following passage from Bigelow on Fraud: "The representation may be intended for a particular individual alone, or for several, or for the public, or for any one of a particular class, or it may be made to A to be communicated to B. Any one so intended by the party making the representation will be entitled to relief or redress against him, by acting on the representation to his damage." The Court speaking for itself then said: "Any one making representation to a commercial agency relating to his business or to the business of any concern with which he is connected, must know and must be held to intend, that whatever he so represents will be communicated by the agency to any patron who may have occasion to inquire. His representations are intended as much for the patrons of the agency and for them to act on, as for the agency itself." Stevens v. Ludlum, 46 Minnesota 16, l. c. 161, 162.
- 2. Allen, a dealer in firearms, represented a gun to be an "elegant twist gun made by Nock," and to be "good, safe, and secure." Nock was a celebrated gun maker. Baker, in bargaining for the purchase of the gun, told Allen that he wanted it for the use of himself and his sons. The gun, shortly after the purchase, burst in the hands of one of Allen's sons, who was using it, and badly injured him. It was ascertained that the gun was not manufactured by the well-known Nock. Among other things stated in his decision Baron Parke said, "A mere naked falsehood is not enough to give a right of action, but if it be a falsehood told with the intention that it should be acted upon by the party injured, and that act produces damage to him" or if, speaking concretely, "instead of being delivered to the plaintiff immediately, the instrument has been

placed in the hands of a third person, for the purpose of being delivered to the plaintiff immediately, the instrument has been lent misrepresentation being knowingly made to the intermediate person to be communicated to the plaintiff and the plaintiff had acted upon it, there can be no doubt that the principle would equally apply." Langridge v. Levy, 2 Meeson & Welsby's English Reports. Quoted in Bennet's Benjamin on Sales, § 431.

## § 81. Representation Not Obviously Untrue.— Representation Relied Upon.—

Representation One of Causes Inducing Plaintiff to Act —

It is said that the representation must not be obviously untrue, that it must be relied upon, and that the representation must have been at least one of the causes which induced plaintiff to act. These three elements are very closely related, yet they are not synonymous. A party's representation may be obviously untrue. Again the representation may be apparently true, yet the other party may investigate and find it is false and if he then acts he does so relying on his own judgment. And there is a third possibility; viz., that the representation may be apparently true and the party to whom it is made may believe it and yet he may not be influenced by it when he acts.

§ 82. Damage.— The last of the elements is that the plaintiff must have suffered damage. And this is so essential that, notwithstanding that there was a false representation of a material fact, made by the party charged, who knew the representation to be false, and who made the statement, which was not obviously untrue, with the intent that the other party (plaintiff) should act on it, and the other party (plaintiff) believing and relying upon it, was induced thereby to act, still if no damage has been caused to such party (plaintiff), then he has failed to make out a case of either innocent or fraudulent misrepresentation, and he cannot recover.

### **EXAMPLE:**

Allen owed Baker \$5,000, but Allen wrongfully and without cause refused to pay Baker the money he owed him. By making some false representations Baker induced Allen to pay the \$5,000.

Allen cannot recover from Baker as Allen suffered no damage (legally) in being fooled to pay his just debt. Brown v. Blunt, 72 Maine 415.

§ 83. Effect of Innocent Misrepresentation.—The effect of an innocent misrepresentation is to render the contract voidable at the option of the one misled. But if one who is induced to enter into a contract by an innocent misrepresentation transfers property to the party making the representation and that party, in turn, transfers the property to a bona fide purchaser for value; i. e., a third person innocent of any wrongdoing and one who pays for the article, such a third person gets an entirely good title to the propertv.

#### EXAMPLE.

Allen made an innocent misrepresentation whereby Baker was induced to enter into an agreement. In pursuance of the agreement and before he discovered the true facts, Baker turned over to Allen a plow. Allen then sold the plow to Carter, an innocent third person, for \$250. Carter got a good title to the plow.

§ 84. Remedy of One Imposed Upon by Innocent Misrepresentation.— A party who has been induced to enter into a contract as the result of an innocent misrepresentation may do one of two things:

(1) He may decide to abide by the contract and thus release the party who made the representation from all liability. This is called "ratification." 5

(2) He may "rescind" the contract. This rescission may take place by mutual agreement of the parties or (as it is more frequently done) by a suit brought in a Court of

(5) "Any act done after the discovery of the fraud by the defrauded party, that treats or recognizes the contract as being still in force, is a ratification. Thus, one who has been defrauded of his goods, by bringing a suit for the purchase price, thereby affirms or ratifies the sale."- Thayer's Synopsis of the Law of Contracts, § 134.

(6) "Rescission consists in giving back that which has been obtained under a contract, and reclaiming what has been parted with, whether it be money or property."— Thaver's Synopsis of the Law of Contracts, § 132.

Equity to cancel the agreement. But the party must act very shortly after he discovers that the innocent misrepresentation had been made or he may be held to have waived (given up) his rights.<sup>7</sup>

#### **EXAMPLES:**

- Allen represented a buggy, which he was offering for sale, to be in good condition, when, in fact, Baker, who was present, could plainly see that the buggy was broken (and that Allen's representation was therefore obviously untrue). If Baker bought the buggy he could not say that in acting, he had relied upon (had confidence in) Allen's statements. "Where the means of knowledge are at hand and equally available to both parties," said the Court, "and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before him where no concealment is made or attempted, he will not be entitled to favorable consideration where he complains that he had suffered from his own voluntary blindness, and has been misled by over-confidence in the statements of another. And the same rule obtains when the complaining party does not rely upon the misrepresentation, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained." Slaughter's Administrator v. Gerson, 13 Wall (U. S.) 379, 383.
- 2. Allen represented that the assets of a corporation were \$10,000 over the liabilities. Baker examined the books and found that the assets were only \$5,000 over the liabilities. If Baker acted, he did so relying upon his own investigation and not upon Allen's representations.
- 3. Allen represented that a house which he was trying to sell Baker cost him \$4,500, when, in fact, the house only cost \$4,000. Baker replied, "I suppose, if you say that, your statement is entirely true. The house looks as if it might have cost that much. But personally I don't care anything about what the house cost. Such information will absolutely not influence me in any way. When I buy property of this kind I consider only the location and the rental, for I am buying it as a speculation." In such a case, if Baker bought the property, it is obvious that the representation was clearly not even
- (7) The word used in Equity to signify waiver of right through waiting too long is "laches."

partly an inducing cause of his (Baker's) purchase. The representation must have been at least one of the causes which induced the plaintiff to act. And in some jurisdictions it is held that the representation must not only be one of the inducing causes but must be the sole cause; yet this, it is believed, is not the better doctrine.

§ 85. Effect of Fraudulent Misrepresentation.—" Contracts affected by fraud are voidable, not void. The defrauded party is alone entitled to avoid the contract, whereas the other party is bound. Furthermore, if a party fraudulently acquires goods or lands of another, and then sells the same for value to an innocent purchaser, the latter gets a good title notwithstanding the fraud. The result would be different if a fraudulent contract was utterly void. In that event the innocent purchaser would acquire no title, as is the case when stolen property is purchased by a person who is ignorant of the theft." h The fraudulent misrepresentation here spoken of by Judge Thayer is sometimes called "fraud in the inducement." The name is indeed appropriate, for the fraudulent misrepresentation is looked upon as the inducement which led the defrauded party to enter into the contract. Although the general statement given by Judge Thayer is entirely true, it must be noted that there is one class of cases in which the weight of authority hold that the fraud makes the contract absolutely void. This kind of fraud is termed "fraud in the execution." It exists where a party who, although he exercises due care, nevertheless is defrauded into signing (executing) one kind of an instrument when he believes he is signing another.

### **EXAMPLES:**

1. Allen, through a fraudulent misrepresentation, induced Baker to enter into an agreement. Pursuant to the terms of the agreement Baker transferred to Allen some property. Allen then sold the property to Carter, an innocent third person. Carter got a good title to the property. (Fraud in inducement.)

2. Allen asked Baker to sign a paper which, on its face, purported to be a lease. As a matter of fact, however, there was

<sup>(</sup>h) Thayer's Synopsis of the Law of Contracts, § 130.

cleverly placed under the receipt a promissory note which had only the place for the signature visible. Baker signed on the line indicated being unable to see that there was a note under the receipt. When Allen got away he simply removed the receipt which was pasted over the note, filled in the note and sold it. In such a case the weight of authority is to the effect that Baker would not be liable on the note. (Fraud in the execution.) Bishop on Contracts, §§ 644–8.

- 3. Allen, an illiterate farmer, was unable to read. He contracted to sell Baker 800 bushels of wheat at 80c per bushel, same to be delivered in two months. Baker, saying that he always makes his agreement in writing, handed Allen a paper to sign. Allen said, "I can't read. There is no one around here that can read. Will you read what you have written to me?" Baker read what purported to be a statement of the contract just entered into, when, in fact, the paper was a deed of Allen's house to Baker. Allen signed and delivered the deed. Such a deed is void and not voidable. Fraud in Execution has taken place.
- § 86. Remedy of One Imposed Upon by Fraudulent Misrepresentation.— One damaged by a fraudulent misrepresentation may do one of four things:

(1) He may decide to abide by the contract.

(2) He may rescind the contract.

(3) He may bring an action at law for damages on the grounds of fraud. This is an action in tort for what is technically called "deceit."

(4) If the contract is not yet completed and he (the injured party) has not yet performed in full, he may refuse to carry out the contract and if he is sued he may set up as a defense the fraudulent misrepresentation.

## Warranty

§ 87. Introductory.— The subject of "warranty" is met with particularly in the law of sales, but inasmuch as the question often arises whether a statement is a representation or a warranty, it is apropos, at this time, to differentiate them, so far as is possible. The definitions and explanations that follow will give the meanings of the terms

only as they should be used when applied to contracts in general.

- § 88. Representation and Warranty Defined.— A representation is a statement or assertion made by one party to the other, before or at the time of the contract of some matter of circumstance relating to it. A warranty is an undertaking or stipulation, written or oral, that a certain fact in relation to the subject of a contract is or shall be as it is stated or promised to be. Again a warranty may be said to be any stipulation or undertaking, express or implied, of the seller, with reference to the title quality, or fitness for a particular purpose of goods which are the subject of a contract of sale.
- § 89. When a Warranty Exists.—" In determining whether there was in fact a warranty, the decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge and on which the buyer may be expected, also, to have an opinion and to exercise his judgment. In the former case there is a warranty; in the latter, not." Again it has been said, "No principle of common law has been better established or more often affirmed, both in the United States and in England than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity and the seller is guilty of no fraud (and is neither the manufacturer nor the grower of the article he sells), the maxim of caveat emptor 8 applies." But it should be borne in mind that the general
- (8) Caveat emptor means, let the buyer beware, that is, a purchaser of property, if he is able to do so, should examine the property to see for himself if he can discover any defects. He may, however forego this examination if the seller makes representations which are unequivocal and which would ordinarily dissuade one from going to the trouble of inspecting the article.
  - (i) Black's Law Dictionary; Warranty.
  - (j) R. M. Benjamin on General Principles of Sales, p. 28.
  - (k) Kenner v. Harding, 85 Illinois, 264, l. c. 268.
  - (1) Barnard v. Kellogg, 10 Wallace (U. S.) 383, 388.

rule, that a warranty does not protect against defects that are plain and obvious to the sense of the purchaser, and which require no skill to detect, has no application to a case where the vendor uses art to conceal and does conceal such defects.<sup>m</sup>

§ 90. Warranty and Representation Differentiated.—A statement made may be one of the inducements which cause the party to enter into the contract. If so, it is not considered a warranty until it becomes a part of the contract itself. Not so with a representation which is never considered a part of the contract itself but is merely one of the reasons or inducements for entering into it. Although upon the same statement of facts there may be a warranty as well as a representation, yet when the assertion is looked upon as being a part of the contract it is then called a warranty, while if viewed only as one of the inducements for entering into the contract it is said to be a representation.

#### **EXAMPLES:**

- I. Allen represented to Baker that a plow (belonging to Allen) was in good condition, when Allen knew, as a matter of fact, that the plow was entirely unfit for use. Baker was induced by Allen's statements to enter into a contract for the purchase of the plow. The contract was put in writing and Allen inserted in the contract the words, "I warrant the plow, which is the subject of this sale, to be in good condition." In this case Baker may view Allen's assertion as being a fraudulent (mis) representation, or, if he chooses, he may treat the false assertion as being a breach of warranty.
- 2. Suppose in the same case that Baker, in the course of the negotiations, spoke the words, "I warrant, etc.," and that when the contract of sale (of the plow) was put in writing the words, "I warrant, etc.," were not inserted in the contract. In such a case Baker could not hold Allen for the breach of warranty, for the so-called "parol evidence rule" forbids the introduction of evidence showing the oral warranty, if the contract of sale has been reduced to writing.

# § 91. Effect of Breach of Warranty and Remedy.—

(m) Kenner v. Harding, 85 Ill. 264.

The effect of innocent and fraudulent misrepresentations has already been treated. It therefore remains for us to consider the effect of a breach of warranty. By the weight of authority it is held that where there is a breach of warranty by the seller, the buyer is not entitled to reject the goods but he has the following remedies:

(1) He may maintain a contractual action against the seller for (damages) for the breach of warranty; or

(2) He may set up as a defense to an action brought against him for the price by the seller the breach of warranty in diminution or extinction (of the price)."

In Massachusetts, Maine, and a few other states, however, the buyer may rescind the contract for a breach of warrantv.°

### **EXAMPLES:**

I. Allen expressly warranted a machine to be perfect in every particular. By the weight of authority Baker, so long as he wishes to rely on the warranty, may not return the machine. But he may sue Allen for a breach of warranty in which his measure of damages would be the difference between the money value of the machine when it was sold and the value of the article if it had been such as the vendor warranted it to be.

2. In the same case, if Baker has not yet paid for the machine, he may wait until Allen sues him for the price and then set up the loss (in value) or the total worthlessness of the machine to offset Allen's suit. If, however, Baker is able to show the presence of the elements of either an innocent or a fraudulent misrepresentation and if he desires to treat the false assertion, not as a breach of warranty, but as either an innocent or a fraudulent misrepresentation he has his remedies, of course, as given in a previous discussion of those subjects.

3. Allen sold hay to Baker and warranted the hay to be wholesome for cattle. In fact, the hay contained a substance which poisoned Baker's cattle. "The damages recoverable for a breach of warranty, include all damages which, in the contemplation of the parties, or according to the natural or usual course of things may result from the wrongful act. For instance, if a man sells hay or grain

<sup>(</sup>n) See R. M. Benjamin on General Principles of Sales, 224.

<sup>(</sup>o) Bryant v. Isburgh, 13 Gray (Mass.) 607, 611.

for the purpose of being fed to cattle, or such as is ordinarily used to feed cattle, and it contains a substance which poisons the buyer's cattle, the seller is responsible for the injury. So, if one sells an animal, warranting or representing it to be sound, which is in fact infected with disease, he is responsible for the damages resulting from a communication of the disease to the buyer's other animals; either in an action of tort for the false representation, or in an action on the warranty." R. M. Benjamin, on General Principles of Sales 228, citing Dushame v. Benedict, 120 U. S. 630.

### **QUESTIONS**

- I. Define the terms "representation," "innocent misrepresentation," "fraudulent misrepresentation." Give a concrete example illustrating each of these terms.
- II. What are the elements of an innocent misrepresentation? Of a fraudulent misrepresentation?
- III. Allen had a large quantity of oranges for sale. On January 1, 1910, he made an offer to sell to Baker all the oranges for a stipulated price, and gave Baker five days in which to accept or reject the offer. Allen represented the oranges to be in good marketable condition, which representation was true when made. On January 2, 1910, Baker accepted the offer and notified Allen to that effect, but Baker did not have the oranges hauled away until January 5, and between January 3 and 5 they spoiled. Was Allen guilty of either an innocent or fraudulent misrepresentation? Give reasons.
- IV. Allen occupied a room in a hotel next to that of one Baker. One evening Allen overheard a conversation between Baker and a third party, by the name of Carter, in which Baker represented that a certain piece of property, which he was offering to sell for \$20,000, actually cost him \$30,000. But Carter refused to buy the property on the ground that he did not consider it a good invest-

ment. Allen was introduced to Baker a few days later, and, thinking that he (Allen) had a chance to make some money, bargained with Baker for the property which had previously been the topic of conversation between Baker and Carter. Allen purchased the property for \$18,000, but at no time did Baker make any representations to Allen as to what the property had actually cost him. Several days after Allen purchased the property he learned that it had only cost Baker \$10,000, and he now desires to bring an action against Baker for fraudulent misrepresentation. Decide the case, giving your reasons.

On January 1, 1910, Allen, in trying to sell a buggy, represented that he had purchased the buggy on July 2, 1909, at 10 A. M. from one Baker for \$150. After some bargaining, Carter bought the buggy, paying Allen therefor the sum of \$100. On January 10, 1910, Carter ascertained that Allen had not bought the buggy from Baker on the morning of July 2, 1909, but had done so in the afternoon of that same day, but the time of the day made no difference whatever in the value or serviceability of the buggy. Carter, however, was sorry he had purchased the buggy from Allen because he found he could use the \$100 to better advantage. He now wishes to sue Allen for a fraudulent misrepresentation. Decide the case, giving reasons.

VI. Allen represented to Baker that the war between the United States and Spain would be settled in three months. On the strength of this representation, Baker entered into a contract with Allen. It developed later that it took four months to settle the war. Do you think that Baker has a legal right to have the contract set aside? If so, why?

VII. Allen falsely represented that a certain horse cost him \$100. He sold the horse to Baker, however, for \$50. The next day after the purchase Baker sold the horse to Carter for \$150. Then Baker learned that Allen had made a fraudulent misrepresentation in stating that the horse had cost him \$100, for, in fact, it had only cost him \$85. Baker decided he would sue Allen in tort for deceit. Decide the case, giving reasons.

VIII. What is the effect on a contract of an innocent misrepresentation? Of a fraudulent misrepresenta-

tion?

IX. What remedies has a party in case he has been deceived by an innocent misrepresentation? By a fraudulent misrepresentation?

X. Distinguish between fraud in the inducement and fraud in the execution. Illustrate by concrete ex-

amples.

XI. What is a warranty? Wherein does it differ from a representation? Illustrate.

XII. What does the expression caveat emptor mean?

XIII. What is the effect of a breach of warranty? Is the rule in all states the same?

XIV. What remedy has a buyer in case there occurs a breach of warranty? Illustrate by examples.

## SECTION IV

### Undue Influence

§ 92. Undue Influence Defined and Explained.— Very closely related to the subject of fraudulent misrepresentation is that of undue influence. In fact, the relief which courts of equity now grant in cases of undue influence is merely an extension of the doctrine applied to cases of fraudulent misrepresentation; i. e., that one person should not profit by deceiving or taking an unfair advantage of another. In fraudulent misrepresentation the deceit is accomplished through positive fraudulent representation made by one of the parties to the other. In undue influence, however, the taking of an unfair advantage is consummated through the overpower-

ing of the will of the individual, which overpowering has become possible either because of the family or confidential relations of the parties, or because of the mental weakness or dire necessities of one of the parties. Undue influence has, therefore, been properly defined as "the abuse of power which stress of circumstances has given to the will of one individual over that of another." p

§ 93. Classification.— There are three large groups of cases in which the stress of circumstances has been held to give to one individual unusual opportunities to take an unfair advantage of another, and in cases coming within these groups, should the weaker party maintain that he has been imposed upon, a transaction will not be allowed to stand unless the party who was in a position to impose can prove that the transaction was, in fact, fair, just, and reasonable. The three groups of cases in which unconscientious use of power is afforded may be stated as follows:

(1) Where one of the parties is connected with the

other by family or confidential relations.

(2) Where one of the parties is mentally weak.

(3) Where one of the parties is in dire need.

§ 94. (1) Family or Confidential Relations.— The family or confidential relations giving rise to a presumption of undue influence exist between husband and wife, parent and child, guardian and ward, trustee 9 and cestui que trust, attorney and client, priest and penitent, physician and patient, and any other persons standing in a similar relation.

§ 95. Contracts Between Parties Occupying Family or Confidential Relationship.— Contracts between parties occupying family or confidential relationship are very closely scrutinized by the courts. There is always a presumption that the superior in these relations; i. e., the husband, parent, guardian, etc., will take an unfair advantage of the inferior;

<sup>(9)</sup> A trustee is a person who holds the legal title to certain property for the benefit of some one else called a cestui que trust, which second party is to enjoy the rents and profits of the property.

<sup>(</sup>p) 9 Cyclopedia of Law and Procedure, 454.

<sup>(</sup>q) Lawson on Contracts, § 260.

i. e., of the wife, child, ward, etc. This presumption arises because of the unusual opportunities which are afforded to the superiors to overpower the will of the inferiors. If the safeguards of the courts of equity were not thrown around the inferior, who is usually the weaker party in these relations, there would be no end of imposition practiced and such imposition could never be remedied.

#### **EXAMPLES:**

- 1. Allen, a strong-willed, unscrupulous man with no property, married Miss Baker, who was a weak-willed woman worth about \$100,000. A week after their marriage, Allen persuaded his wife to deed to him \$50,000 worth of her real estate. A month after this deed was given Allen deserted his wife. In such a case, if Mrs. Allen desired it, there is little doubt but that a court of equity would set aside the deed. Cf. Golding v. Golding, 82 Ky. 51.
- 2. Allen induced his two sons to agree to sell him their land which they had inherited from a third party. The boys were of legal age, but they knew very little about business and were still under their father's direct control. The deed was made at the father's suggestion and solicitation and upon requests from him that practically amounted to commands. The amount to be paid for the land was about one-fourth of its market value. Such a contract could be set aside upon the sons' requesting it. Cf. Tucke v. Buchholz, 43 Iowa 415.
- 3. Allen, a priest, refused to grant absolution to Miss Baker unless she would agree to convey to Allen as a gift a house worth \$4,000. Miss Baker made the conveyance but later regretted that she had done so. In such a case if Miss Baker petitioned a court of equity there is little doubt but that the conveyance would be set aside.
- § 96. (2) Mental Weakness.— A contract made by a party whose mind <sup>10</sup> is enfeebled by old age, sickness, distress, or any other cause, is said to be made under undue influence and such a contract will not be allowed to be taken advantage of by either party.<sup>r</sup>
- (10) The student should note that by "mental weakness" or "feeble mindedness" is meant a condition that can not exactly be called insanity and yet indicates a partial lack of complete mental power or mental control.

(r) Lawson on Contracts, § 270.

#### EXAMPLE:

Allen, a man of 85 years of age, was induced by Baker, a real estate dealer, to agree to pay \$25,000 for a house, the market value of which was about \$5,000. Such a contract would be set aside at the instance of Allen, or his heirs, unless Baker could convince the court that the utmost good faith had been used by him, and in such a case this would be very difficult.

§ 97. (3) Necessities of a Party.— Where an expectant heir 11 is in need or thinks he is in need of money and some one else takes advantage of the situation to extort from the heir a promise to pay an unreasonably large amount for the loan, such a contract will usually be set aside upon the application of the one imposed upon. And it may be said that in many other cases where a person is in dire need of money and is compelled to agree to pay a much larger amount than the loan made, courts of equity will often set aside such a contract upon the application of the borrower. It must also be noted that such cases often involve a positive violation of statute law, and if they do so courts of law will then permit the violation of the statute to be pleaded in defense to an action brought to recover the money loaned.

### **EXAMPLES:**

- I. John Allen, a young man of 21 years, was the only son of Richard Allen, who was worth \$10,000,000. Richard Allen did not believe in giving his son, John, large sums of money to spend, for fear that the boy would become dissolute. John, however, being desirous of "keeping pace" with the antics of some of his friends, borrowed \$5,000 from Baker, a money lender, for which John Allen gave Baker a written instrument containing a legal assignment of all of John's rights to his father's property. Such a transaction would probably be considered unconscionable and would be set aside upon John Allen's request. Baker would probably be allowed the \$5,000 plus the interest at the legal rate for the time the money was used.
- (11) An expectant heir is a person who, if nothing prevents, will inherit the estate of some other party. For example, the sons of a wealthy man, who is still living, are expectant heirs of their father's property.

- 2. Allen sold and transferred to Baker, after the money had become due from the insurance company, a policy of insurance for \$2,000. Baker demanded payment from the insurance company and they were willing to pay the \$2,000 but demanded that Allen, as well as Baker, sign the release. Allen refused to do this unless Baker would agree to pay him \$500 for his signature. Baker, believing himself to be helpless, agreed to pay the \$500 whereupon Allen signed the release. Baker may then go into a court of equity and have the contract with Allen set aside. Cf. Coplice v. Kelley, 23 Kansas 474.
- § 98. Rescinding Agreements Obtained Through Undue Influence.— The rules respecting the right to rescind contracts entered into under undue influence follow, so far as equity is concerned, the rules which apply to fraud, but with one qualification. In case of fraud as soon as the fraud is discovered the parties are placed on an equal footing, and the affirmation of the contract or laches (delay) in setting the contract aside binds the party who was originally defrauded; but in the case of undue influence it is not a particular statement, but a combination of circumstances which constitutes the vitiating element of the contract; and unless it is clear that the will of the injured party has been freed from the dominant influence under which is has been placed, affirmation or laches will not be allowed to prevent him from having the contract set aside.<sup>12</sup>

## **QUESTIONS**

- I. Define the term "undue influence." Differentiate between undue influence and fraudulent misrepresentation.
- II. State the three groups of cases in which unconscientious use of power is particularly afforded.
- III. Between whom are family or confidential relations said to exist?
- IV. Allen, who was a preacher, obtained a dominance over the will of Miss Baker, one of the members
- (12) This statement has been taken with some few changes from Lawson on Contracts, § 277.

of his congregation. While Miss Baker was under Allen's influence, she executed a promissory note to Allen for \$4,000. Is this note binding on Miss Baker if Allen still holds it? Suppose Allen sold the note to Carter, who knew nothing of how the note was obtained. Can Carter hold Miss Baker? (Use your knowledge of the effect of void and voidable instruments to answer this question.)

V. Allen, a step-child of Baker, sued in equity to have a deed, made to Baker, set aside on the grounds that it had been made at Baker's command and had been delivered one day after Allen had reached his majority. On whom rests the burden of proving good faith, or the absence of good

faith, in such a case?

VI. State the rule in regard to contracts made by a strong-minded person with one who is mentally weak. Does the person who is mentally weak have to be insane to make this rule apply?

VII. Give an original illustration showing how the rule mentioned in your last answer would operate.

VIII. State the rule in regard to contracts made with one in need.

IX. Who is an expectant heir?

X. What remedy has a party who has entered into a contract under undue influence?

### SECTION V

### Duress

§ 99. Introductory.— We have seen that when a contract is entered into with mutual mistake, it may be set aside at the option of the parties. We have also noted that when innocent or fraudulent misrepresentations taint a contract the party deceived may, at his election, have the contract set aside. We have found that when a party entered into a

contract under undue influence, he might also have same declared of no effect, by the proper tribunal. There yet remains to be considered the effect of "duress" upon contracts.

§ 100. Definition.—"Duress" is any unlawful physical force (or restraint) applied or threatened to the person of the party or of the party's huband, wife, parent, or child through constraint of which he, in form, consents to what he

otherwise would not.8

§ 101. Classification.— Duress exists in two groups of cases. First, where actual, unlawful physical force or physical restraint is applied to a human being. Second, where threats to apply unlawful, physical force or physical restraint to a human being have been made. The first of these two groups constitutes duress by force and duress by imprisonment. The second group is duress by threats or duress per minas.

§ 102. Duress by Force and Imprisonment Defined. — Duress by force consists in the actual application of unlawful force to a party (or to the husband, wife, parent, or child of such said party) thereby inducing said party to pay money, deliver property, or enter into any contract or obligation in order to secure the removal of such force. Duress by imprisonment consists in unlawfully physically restraining a party (or such party's husband, wife, parent, or child) and thereby inducing the party to pay money, deliver property, or enter into any contract or obligation to secure his release (or the release of the husband, wife, parent, or child) from such restraint.

§ 103. What Unlawful Force Is.— By force in duress is meant nothing different than what is meant in ordinary parlance. Force is unlawful if it is applied without the sanction of the law. In regard to unlawful physical restraint, it must be noted that the law has provided for certain methods of lawful imprisonment. If any other methods are employed than the ones sanctioned by the law, the restraint

is unlawful.

<sup>(</sup>s) Bishop on Contracts, § 75.

#### **EXAMPLES:**

- t. Allen, an individual of ordinary firmness, was walking along a country road. Baker, a passerby, assaulted Allen and beat him violently with a cane. Allen begged for mercy and Baker said he would stop hitting him if he (Allen) would sign a contract to do certain things. Allen signed the contract. This was duress by force.
- 2. Allen, an individual of ordinary firmness, was kidnapped and was locked in a room by Baker. In order to secure his release Allen entered into a contract to pay Baker \$4,000. This was duress by imprisonment.
- 3. Allen's son, Richard, was unlawfully restrained by Baker. In order to secure Richard's release, Allen paid Baker \$1,000. This money was obtained through duress by imprisonment.
- § 104. Duress by Threats, Defined and Explained.—Duress by threats, or per minas, as it is often termed, consists in the execution of an obligation or the payment of any valuable property by a party to avoid any serious bodily harm which is imminently threatened to the party (or to the husband, wife, parent, or child of such party). The threats must be such as to strike with fear a person of common fairness and consistency of mind. Mere advice, direction, or persuasion is not duress.

## EXAMPLE:

Allen, a man of fair mind, was threatened by Baker, an armed highwayman, with immediate death unless he (Allen) would sign a note to pay Baker \$1,000. Allen signed the note. This was duress by force or per minas.

§ 105. What Force or Threats Necessary.— It should be noted that in all cases where duress has been practiced, it must be shown that the force or threats were of such a character as to take away the free agency of the individual or to destroy his power of withholding his real consent to handing over the property or entering into the contract or obligation.

§ 106. Duress Renders Contract Voidable.— Con-

(t) Lawson on Contracts, § 256.

tracts entered into under duress are voidable, but only at the election of the party intimidated. The person guilty of the duress is bound if the one intimidated wishes to stand by the contract.

§ 107. Remedies.— The party intimidated may obtain the following relief:

(1) He may have the contract rescinded in equity.

(2) He may bring an action at law to recover any money or property which he has paid over to the guilty party. In such a case the law implies a promise to repay money.

(3) He may set up the duress in defense to an action

brought against him on the contract.

- § 108. Duress of Goods.— We have up to this time been discussing only duress of the person. A word should be added in regard to a form of duress known as "duress of goods." This consists in taking, destroying, detaining, or threatening to take, destroy, or detain a person's property in order to compel such person to do that which he would not otherwise do.
- § 109. Effect of Such Duress.— The law is unsettled in the United States as to whether if a party enters into an agreement under duress of goods he will be entitled to the relief previously mentioned under remedies for duress. The wight of authority seems to be against so doing. There is some authority for the statement, however, that if a party threatens to destroy your property and you enter into a contract with him in order to prevent his carrying into execution his threat, you will be entitled to the same relief as is obtainable in contracts entered into under duress of person."

## **QUESTIONS**

- I. What is duress? What two kinds of duress are there?
- II. Define duress by force; duress by imprisonment.
  Illustrate.
- (u) Bishop on Contracts, § 724.

III. Define duress by threats. Illustrate.

IV. What effect has duress on contracts?

V. What remedy has the party intimidated?

What is meant by duress of goods? What is the VI. effect of such duress?

VII. Allen, a clever salesman, talked to Baker five hours and finally induced Baker to enter into a contract. Baker wishes to have this contract set aside on the ground of duress. Can he do so?

VIII. Allen, who had in his care Baker's horse, refused to return same until Baker signed a certain contract. Baker signed the contract and then Allen returned the horse. Baker now desires to have the contract which he signed set aside. what conditions can he do so, if any?

IX. Allen had Baker lawfully arrested. Then Allen told Baker he would have him released if Baker would pay him \$500. Baker paid the money to Allen, who promptly had him (Baker) released. Can

Baker recover the money? Why?

X. Allen signed a promissory note to pay Baker \$500 in order to obtain the release from custody of his wife, who was unlawfully locked up in Baker's house. Baker sold the note to Carter, who knew nothing of how the note had been obtained. Can Carter recover on the note? Why? What is the fundamental principle underlying this case?

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### CHAPTER VIII

### CONSIDERATION

OUTLINE

CONSIDERATION

I. In General (1) Definition
2) Effect of Seal at Common Law

II. Classified  $\begin{cases} 1 \\ 2 \end{cases}$  Good  $\begin{cases} 1 \\ 2 \end{cases}$  Benefit to Promissor Detriment to Promissee

III. Not sufficient to support a contract

1) Promise to Do That Which One Is Already Legally Obliged to Do
2) Payment of a Smaller Sum for a Larger Sum Due
3) Past Consideration

IV. Contract may be 2) Mistake, Fraud, Duress and Undue Influence—
avoided by Evidenced at Times by Inadequate Consideration

§ 110. Definition

§ 111. Valuable and good consideration

§ 112. Benefit to promissor and detriment to the promissee

§ 113. A seal

§ 114. Adequacy of consideration

§ 115. Exchange of sums of money

§ 116. Past consideration

§ 117. Special cases where no legal consideration exists

§ 118. Failure of consideration

§ 119. Consideration may always be shown

§ 110. Definition.— "Consideration," which was given as the fourth essential of every valid contract, may be said to consist in some right, or benefit accruing to the promissor a to a contract, or some forbearance, loss, or detriment suffered or undertaken by the promissee.

§ 111. Valuable and Good Consideration.— It must be stated, however, that the definitions given in the preceding

(a) The promissor is one who makes a promise. The promissee is one to whom the promise is made.

paragraph have in mind such a consideration as is deemed in the law to be valuable. We often find used the phrase "good consideration." By this is meant that the material cause which moves the contracting party to enter into the contract is love and affection. If, for example, a father contracts to deed to his son a horse simply because of the love and affection he bears for the son, such a contract would rest on what is known as a "good consideration." An important thing to be noted about this is that if the father failed to make the deed as he contracted to do, the son could have no legal recourse against him. If, however, the father actually made the deed and delivered it to his son, the transaction would be similar in character to a gift made to any other person, and would stand, unless the rights of existing creditors of the father would be interfered with, when the deed would be set aside. Inasmuch, however, as a good consideration is not sufficient to support an executory contract, we will not further consider it, but will confine our attention to such contracts as are supported by a valuable consideration.

§ 112. Benefit Accruing to Promissor or Detriment Suffered by Promissee.— A valuable consideration, as has been indicated, consists in a benefit accruing to the promissor to a contract or a detriment suffered by the promissee. By this it is seen that the consideration which will support a contract need not necessarily consist in a benefit to the one promising but that it may rest upon a detriment (something suffered) by the other party to whom the promise is made. Ordinarily, however, both parties receive a benefit and both suffer a detriment.

### **EXAMPLES:**

1. Allen employed Baker to do certain work. It was contracted that Baker was to receive the sum of \$5,000 a year for his services. In this case the consideration supporting the contract, so far as Allen was concerned, was the promise of the services which Baker was to render; and the consideration, so far as Baker was concerned, was the promise of the \$5,000 which he was to receive from Allen. If the contract was performed, Allen received a benefit in getting Baker's

services and Baker received something of value in getting Allen's money. Allen suffered a detriment in parting with the \$5,000, and Baker was inconvenienced in giving up his time for one year.

2. Allen, a business man, went to Baker, an attorney, for advice in regard to a legal matter. Baker gave the advice, for which he charged Allen \$100. The consideration in this contract, considered from Allen's standpoint, was the advice which he received, and viewed from Baker's position was the \$100 which he was to get. Allen received a legal benefit in getting legal advice, even though he may not have actually been assisted thereby, and he suffered a loss in parting with the \$100. Baker benefited in getting the \$100; and he suffered a legal detriment in giving up his time to Allen.

3. Allen owes Baker \$1,000. Baker threatens to sue Allen for the money, and in order to avoid being sued Allen gets Carter, his

friend, to write Baker the following note:

3-10-08.

#### "Mr. Baker:

"If you will contract to give Mr. Allen three months' more time in which to pay the \$1,000 which he owes you, I will guarantee the payment of that sum of money, and if same is not paid within three months from the date of this letter, I will pay you the \$1,000.
"John Carter."

Mr. Baker, knowing that Carter was a responsible party, accepted the terms of this offer. He waited the three months and then, inasmuch as Allen did not pay the money, he (Baker) demanded the \$1,000 from Carter. The contract between Baker and Carter was supported by a valuable consideration, inasmuch as Baker, in agreeing to wait and in waiting three months, surrendered his valuable right to sue Allen immediately and thereby suffered a legal detriment.

4. On March 20, 1869, John Allen contracted to and with Richard Baker, his nephew, that if said nephew would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money, until he should become twenty-one years of age, then he, John Allen, would at that time pay to him, the said Richard Baker, the sum of \$5,000 for such refraining, to which said Richard Baker consented. Said Richard Baker in all things fully performed his part of said contract. John Allen refused to pay the \$5,000, so his nephew brought suit for the money. On behalf of the uncle it was contended that the contract was without consideration because the uncle gained nothing by his nephew's refraining from the habits mentioned, and because, furthermore, it was in reality a good thing for the nephew to so refrain. In a similar case the court held that the \$5,000 could be recovered. "A \* \* consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party or to some forbearance, detriment, loss, or responsibility, given, suffered or undertaken by the other. \* \* The second branch of this judicial description is really the more important one. Consideration means not so much that one party is profited as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first.'

"Now, applying this rule to the facts before us, the promisee (the nephew) used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise \* \* \* that for such forbearance he would receive \$5,000. We need not speculate on the effort which may have been required to give up the use of these stimulants. It is sufficient that he restrained his lawful freedom of action within certain prescribed limits upon the faith of his uncle's contract; and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promissor (the uncle), and the court will not inquire into it." Hamer v. Sidway, 124 N. Y. 538.

- 5. Allen entered into a valid contract with Baker, in which it was agreed that Allen was to work for Baker for one year and that Baker was to pay Allen \$10 per week for his work. Allen worked for about one month when he was offered a salary of \$25 a week for the same kind of work by one Carter. Allen thereupon went to Baker and offered to pay Baker the sum of \$50 if Baker would release him (Allen) from his contract. Baker consented to release Allen under those conditions and Allen went to work for Carter; but when Baker demanded the \$50 Allen refused on the grounds that there was no consideration for the contract. In a suit Allen would be held liable for this \$50, for Baker had released Allen from a binding contract and such a release is a valid consideration in the eyes of the law.
- 6. Miss Dorothy Allen contracted to marry Mr. Thomas Baker, provided Mr. Baker would contract to deed to her, a certain day after their marrage, a certain piece of land which was designated. Baker agreed to deed the land. This was a contract. Marriage is said to be the most valuable consideration known to the law.

§ 113. A Seal.— We cannot treat the subject of consideration without speaking of a "seal." At the common law (that which came from England) if a seal was attached to a contract such a contract was conclusively presumed to be supported by a sufficient consideration and no evidence could

be introduced disputing this presumption.

"A seal originally consisted of a piece of wax attached by a ribbon to a document, and stamped with the coat of arms or other peculiar device of the individual executing the document. The courts deemed that such document should be binding, because of the solemn manner in which it was executed. The signet rings which many persons wear are survivals of this ancient custom, similar rings having been formerly used for making an impression on wax. course of time substitutes for the wax seal were introduced. Colored paper wafers pasted to a document were given the same legal effect as wax seals, since the intention of the parties to make their deed or contract a 'sealed' one was thus indicated. Finally, a mere scroll seal resembling a paper wafer, and with the word 'seal' written or printed inside it was employed. This also indicates the intention of the parties to bring themselves within the custom which gives special validity to sealed documents, and the courts have recognized this intention. Indeed, in a few states a scratch of the pen or any mark intended to represent a seal will be given legal effect as such. For instance, the letters 'L. S.' are sometimes used for this purpose. These letters are the initials of the Latin words, locus sigilli, which mean 'the place of the seal.' Where any such substitute is used in place of the old fashioned seal the party should be careful to recite the fact that the document is sealed." b To do this the parties usually conclude the body of the contract with the words "In witness whereof we have hereunto set our hands and seals." In many of the states 1 of our Union

(b) Sullivan on American Business Law, § 58.

<sup>(1)</sup> Arizona, Arkansas, California, Colorado, Idaho, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, North Dakota, Ohio, South Dakota, Tennessee, Utah, Washington.—Sullivan on American Business Law, § 61.

the seal has lost much of its importance and in such states a contract must be supported by a valuable consideration, notwithstanding that it has a seal attached. And it is always advisable to have a contract supported by a valuable consideration, however small that consideration may be, in order

that there may be no question as to its validity.

§ 114. Adequacy of Consideration.— "When a promise is founded upon a consideration which the law deems valuable, it will be enforced, although the consideration may be inadequate." A promise on the part of a person to sell a horse that is worth \$100 for \$25 is supported by as valuable a consideration in the eyes of the law as a promise to sell the horse for what its full value would be. Courts pay no attention to the fact that the consideration for a promise is inadequate, except in those cases where it is maintained that reality of consent was absent. In such cases inadequacy of consideration may be strong evidence tending to prove the lack of consent.

§ 115. Exchange of Sums of Money.— There is one class of cases in which the courts have uniformly held that a different rule applies than that given in the previous paragraph. Briefly stated this exception is that one sum of money is not the legal equivalent of a greater sum and the promise of one party to accept a smaller sum than what is due him will be held to be without consideration. In those cases "when a person owes a certain sum of money, say \$1,000, a promise by the creditor (the person to whom the money is due) to take a less sum in money, say \$750, and to discharge the debt, is not enforceable. As the law measures all values in money, \$750 is not regarded as the equivalent of \$1,000; therefore a promise to pay the smaller sum is not valid consideration for a promise to discharge a debt for the larger amount which is, at the time, due. Nevertheless, a promise to accept something besides money which the debtor is not bound to deliver, in discharge of a debt of \$1,000, would be valid, although the creditor received much

<sup>(</sup>c) Thayer's Synopsis of the Law of Contracts, § 29.

less in value than \$1,000." d Again, if an honest dispute exists as to the amount due by one to another, then the amount definitely agreed upon as a settlement of the controversy will be binding. So, too, where a party owes a number of creditors and these creditors compromise it is then held that the mutual understanding among all to become parties to it, that each is to take the composition agreed upon and forbear further to press or insist upon their claim, is sufficient consideration to support the contract and it will be allowed to stand.

#### **EXAMPLES:**

- 1. Allen offered to sell Baker a farm for \$1,000. Baker accepted Allen's offer. When Baker tendered the \$1,000 to Allen he asked for a deed to the farm. Allen refused to deliver it on the grounds that the farm was worth \$3,000. Allen would either have to deliver the deed or answer in damages to Baker, as the law in such cases does not concern itself with the adequacy of consideration.
- 2. Allen owed Baker \$1,000. Baker demanded the money. Allen said he would not pay in full, but that if Baker would give him a receipt in full he would pay \$900. Baker gave the receipt in full, received the \$900 and then sued Allen for the \$100. He could recover the \$100, for his promise to take a less sum than was legally due him was without legal consideration.
- 3. Allen owed Baker \$3,000. Allen, being pressed for money, agreed to give Baker a deed to a house in payment of the debt. Baker accepted the deed as payment in full of the debt of \$3,000. The house was worth only \$2,000. Baker sued to recover the \$1,000, which he claims is still due him. This he cannot recover as he accepted not another sum of money which was less in value than the amount due him, but an article the value of which it was for him to have determined when he accepted it in payment of the debt.
- 4. Allen owed five creditors \$2,000. He had only \$5,000, so he offered to pay these creditors 50c on the dollar if they would release him from his obligations. The creditors contracted to accept 50c on the dollar in full settlement of their claims against Allen. They are bound by this, inasmuch as the courts have said that the promises of the creditors constitute a mutually binding contract.

# § 116. Past Consideration .- We sometimes hear the

(d) Thayer's Synopsis of the Law of Contracts, § 22.

phrase "past consideration." "A past consideration, it is said, is some act or forbearance in time past by which a man has benefited without thereby incurring any legal liability. If, afterward, whether from good feeling or interested motives, he makes a promise to the person by whose (previous) act of forbearance he has benefited, and that promise is made upon no other consideration than the past benefit, it is gratuitous and cannot be enforced." e If, however, a contract is supported in part by a past consideration and in part by a present valuable consideration, it will then be a valid contract. So also where an infant upon reaching his majority agrees to pay a debt contracted during infancy, the past consideration will support the fresh promise to pay; likewise when a debtor whose debt is discharged by bankruptcy proceedings, or by the operation of the statutes of limitations, makes a new promise to pay the debt. In some states, however, such new promises must be in writing.

#### **EXAMPLES:**

I. Allen and Baker were good friends. One day Allen as an evidence of his friendship for Baker gave him (Baker) a saddle horse. A few days afterward, Baker promised Allen, that, in consideration of the beautiful horse which Allen had previously given him as a present, he (Baker) would do a certain piece of work for Allen. Later on Baker decided that he would not do the work. Allen could have no legal redress against Baker inasmuch as the promise of Baker was based upon a past consideration; namely, something which Baker had benefited by in the past without incurring any legal liability therefor.

2. Allen gave Baker a gold watch as a birthday present. A few days later Baker promised Allen that in consideration of the gold watch which Allen had previously given him and \$2 which Allen would pay him in the future he (Baker) would paint a front porch for Allen. This would be a valid contract, for although the gold watch was a past consideration, yet the addition of the present valuable consideration, namely the \$2 promised, makes the contract an enforce-

able one.

- § 117. Special Cases Where No Legal Consideration
- (e) 9 Cyclopedia of Law and Procedure, § 358.

Exists.— In view of what has preceded it is almost unnecessary to say that if a contract is not supported by a valuable consideration it will not be enforceable. It may be well, however, to call special attention to a group of cases in which, although legal consideration seems to be present, as a matter of fact it does not really exist. Wherever one party to an alleged contract promises to do no more than it was his legal duty to perform before the alleged contract was entered into, such a promise by him will not constitute a valuable consideration for such alleged contract.

#### **EXAMPLES:**

- required to serve subpoenas whenever requested by one of the parties to a suit. One day Allen refused to serve a subpoena unless Baker would agree to pay him \$5 for so doing. Baker agreed to pay the money and Allen thereupon served the subpoena. Baker then refused to pay the \$5. Allen would have no legal recourse against Baker inasmuch as Allen had done only what the law had required him to do previous to making the contract.
- 2. Allen owed Baker \$500. Allen refused to pay this just debt unless Baker would work for him one month for nothing. Baker contracted to do the work, whereupon Allen paid him the \$500. Then Baker refused to do the work. Allen would have no legal remedy against Baker as there was no valid consideration to support the contract. It is true that Baker agreed to do the work but Allen did only that which the law would have compelled him to do previous to making the contract.
- § 118. Failure of Consideration.— "It sometimes happens that an article or thing bargained for, contrary to the expectation of the parties, has no existence, or the title thereto fails, or the article is different in kind or quality from what it is supposed to be. In all these cases, the consideration supporting the buyer's promise to pay or the article or thing bought, is said to have failed. Sometimes the consideration fails in toto (entirely), in which event the buyer's promise cannot be enforced; or if he has paid for the article, the sum paid may be recovered. In other instances there

may be a partial failure of consideration, in which event the seller can recover only a portion of the contract price."

### **EXAMPLES:**

- 1. Allen and Baker both lived in the city of St. Louis. Allen owned a house in Chicago. Allen agreed to transfer the deed to the house to Baker for the sum of \$4,000. Baker paid the \$4,000, when he discovered that ten minutes before Allen had delivered to him the deed, the house had burned down. Baker could recover the \$4,000, for there had been a failure of consideration so far as Allen was concerned. If, however, the house had taken fire immediately after the deed had been delivered, then Baker would have to bear the loss inasmuch as at the time of the closing of the deal the consideration had existed.
- 2. Allen contracted to sell Baker a certain 400 pairs of shoes, which were in transit from New York to St. Louis, for the sum of \$2 per pair, making a total of \$800. It was later discovered that 200 pairs of the 400 pairs of shoes had been stolen before the contract was made. Baker would, therefore, be bound to pay only for the remaining 200 pairs, for part of the consideration had failed.
- § 119. Real Consideration May Always be Shown.—In a suit on a contract no matter whether the contract be oral or written, the real consideration may always be shown notwithstanding that it differs from the consideration expressed in the contract. This is permitted because the admission of such evidence prevents the enforcement of contracts based upon an unlawful or immoral consideration.<sup>8</sup>

### **QUESTIONS**

- I. Define the terms "good consideration"; "valuable consideration."
- II. What is meant by the expression "a benefit to one party or a detriment to the other"?
- III. Allen promised to pay Baker \$500 if Baker would drop a law suit which he had brought in good faith against Allen. Baker dropped the law suit
- (f) Thayer's Synopsis of the Law of Contracts, §§ 30-31.
- (g) Thayer's Synopsis of the Law of Contracts, § 35.

and Allen then refused to pay the \$500. If Allen can prove that he would have won the suit had Baker not dropped it, could Baker nevertheless recover the \$500 which Allen had promised him for dropping the suit? Cf. Flanagan v. Kilcome, 58 N. H. 443.

IV. What is a seal? Does it import a consideration?

V. Is it necessary that the consideration of a contract

be adequate?

VI. Allen contracted to pay Baker \$5 for a horse worth \$50 and Baker contracted to accept the \$5. In the eyes of the law would the consideration of this contract be a sufficient one to support a contract?

VII. Give an example of a past consideration.

VIII. A number of seamen were under a valid contract to make a trip from San Francisco to Seattle and back to San Francisco for \$20 per week. When the boat put in at a harbor some distance from Seattle the seamen all threatened to leave the boat unless the captain would contract to pay them \$40 per week. Inasmuch as the captain could get no other seamen at that place he promised them that he would pay the \$40. When the boat returned to San Francisco the men demanded their wages and the captain refused to pay them any more than the \$20 per week, originally agreed upon. Could the men recover at the rate of \$40 per week, and if so, why?

IX. Give an example of total failure of consideration;

of partial failure of consideration.

X. May consideration always be shown, and if so, why?

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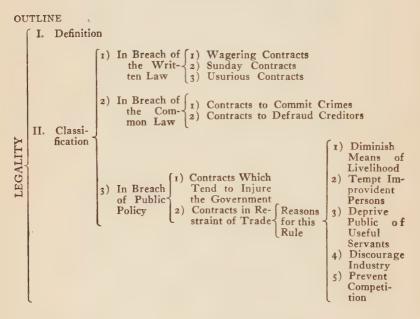
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### CHAPTER IX

### LEGALITY



## § 120. Introductory

## I. Contracts in Breach of the Written Law

- § 121. Such contracts not enforceable
- § 122. Wagering contracts
- § 123. Sunday contracts
- § 124. Usurious contracts

### II. Contracts in Breach of the Common Law

- § 125. Rule
- § 126. Contracts to commit crimes
- § 127. Contracts to defraud creditors

# III. Contracts Contrary to Public Policy

- § 128. Public policy explained rule given
- § 129. Contracts which tend to injure the government
- § 130. Contracts in restraint of trade
- § 131. Reasons for rule:
  - (1) Diminish means of livelihood
  - (2) Tempt improvident persons
  - (3) Deprive public of useful servants
  - (4) Discourage industry
  - (5) Prevent competition
- § 120. Introductory.— The fifth essential of every valid contract is legality, i. e., the contract must be to do or not to do some lawful thing. Parties are free to contract as they please so long as they do not come into conflict with the law, but when contracts which the law forbids are made, then the courts will refuse to enforce such contracts or give damages for the breach of them. The contracts which the law forbids may be conveniently grouped under three main heads:
  - I. Contracts in Breach of the Written Law
  - II. Contracts in Breach of the Common Law
  - III. Contracts Contrary to Public Policy

I

## Contracts in Breach of the Written Law

- § 121. Such Contracts Are Not Enforceable.— Any contract forbidden by the written law will not be enforced by the courts nor will damages be allowed for the breach of such contracts. There are innumerable contracts of this character but we shall be able to consider only the following, namely, wagering contracts, Sunday contracts, and usurious contracts.
- § 122. Wagering Contracts.— A wagering or gambling contract is "one in which the parties stipulate that they shall gain or lose, upon the happening of an uncer-

tain event in which they have no interest except that arising from the possibility of such gain or loss." At the common law (that which came from England) wagering or gambling contracts were not illegal, but courts in many of our States refuse to accept the early English view, and these courts hold such contracts to be illegal. In order to put an end to any doubt as to the rule in such cases, most of the States have enacted statutes declaring wagering contracts to be illegal.

### **EXAMPLE:**

Allen entered into a contract with Baker in which it was agreed that if a certain horse called "Jennie" won a certain race, he (Allen) would pay Baker \$100, but if the horse named "Eva" came in first, then Baker would pay Allen \$200. Eva won the race and Baker refused to pay the money. If the statute of the States or the decisions of the Court of Last Resort in that State declared wagering contracts illegal, Allen would have no legal recourse against Baker.

§ 123. Sunday Contracts.— In most of the States statutes have been enacted declaring that contracts, pertaining to worldly business, which are made on Sunday, shall be considered illegal. By "worldly business" is meant transactions for private gain. Contracts in aid of a church or for charitable purpose or with no hope of private gain in view are not contrary to such Sunday statutes; so, also, the publishing of a Sunday newspaper has been held not to be illegal.

### **EXAMPLE:**

On Sunday, January 16, 1910, Allen entered into a contract with Baker whereby it was stipulated that Allen was to work for Baker for one month for the sum of \$400. When the time came for Allen to go to work he refused on the grounds that the statute of the State declared contracts made on Sunday to be illegal. This was a good defense.

- § 124. Usurious Contracts.— A usurious contract is one in which it is stipulated that a higher rate of interest is to
  - (a) Black's Law Dictionary: Wagering Contracts.

be paid for the use of money than that allowed at law. At the common law, parties were permitted to stipulate for any rate of interest that they saw fit. In many of our States, however, statutes have been passed declaring what shall be the legal rate of interest, i. e., the rate which the courts will allow, provided the parties fail to stipulate for any specific rate, and what shall be the maximum rate of interest, i. e., the highest rate which the parties may lawfully agree upon. But in some of the States a legal rate alone has been fixed, while the maximum rate is left open; and also in some of the States special laws have been passed permitting certain kinds of commercial enterprises, for example, business and loan associations, to charge a special rate of interest. The following table gives only the general interest laws in the various States. For special laws the student must consult the statutes in his State:

#### **EXAMPLE:**

Allen borrowed \$100 from Baker for which he gave Baker a promissory note and agreed to pay interest at the rate of 15 per cent per annum. The transaction took place in Minnesota. When the note fell due Allen refused to pay it. Baker could have no legal recourse against Allen, for the State of Minnesota declares that anyone who charges more than 10 per cent interest per annum for the use of money shall forfeit his right to recover both principal and interest.

State	Legal Rate Per Cent	Maximum Rate Per Cent	Penalty for Exceeding Maximum Rate
Alabama .	8	8	Forfeiture of all interest
Alaska	8	12	Forfeiture of principal to school fund
Arizona	6	IO	
Arkansas .	6	10	Forfeiture of principal and interest
California .	7	No limit	No penalty
Colorado .	8	24	
Connecticut	6		Forfeiture of principal and interest; also fine and imprisonment

	T .1		Donalis for
	Legal	Mavimum Kata	Penalty for Exceeding
State	Rate	Por Cont	Maximum Rate
	Per Cer		
Delaware	6	6	Forfeiture of principal and
			interest and a sum equal to
			amount of loan is recoverable
District of Columb	ia . 6	10	Forfeiture of all interest
Florida	8	10	Forfeiture of all interest
Georgia	7	8	Forfeiture of all interest over
			8 per cent
Idaho	7	12	Forfeiture of all interest and
			of 10 per cent per year on
			the principal
Illinois	5	7	Forfeiture of all interest
Indiana	_	8	Forfeiture of all interest in
			excess of 6 per cent
Iowa	6	8	Forfeiture of all interest and
			of 8 per cent per year of
			principal
Kansas	6	10	Forfeiture of all interest
22011000 11111111	••••		charged in excess of 10 per
			cent and also a penalty
Kentucky	6	6	Forfeiture of all interest in
Ixentucky			excess of 6 per cent
Louisiana	5	8	Forfeiture of all interest
Maine		No limit	No penalty
Maryland		6	Forfeiture of all interest in
Waiyiand		The second second	excess of 6 per cent
Massachusetts	6	No limit	No penalty
Iviassaciiusetts	0	except on loans of	210 Politary
		less than \$1,000 no	
		more than 18 per	
		cent is recoverable	
Mishigan		7	Forfeiture of all interest
Michigan Minnesota	_	10	All excess interest may be re-
Willingsota	0	10	covered and all usurious
			bonds and mortgages are
			void except as to bona fide
2 41 1 1 1		0	*
Mississippi		8	Forfeiture of all interest
Missouri	6	8	Forfeiture of all interest in
26			excess of 6 per cent
Montana		12	Twice amount of interest
Nebraska		10	Forfeiture of all interest
Nevada	7	12	Forfeiture of all interest in
			excess of legal rate

	Lega	l Per Cent	Penalty for
State	Rate	Manimum Bat	Exceeding
	Per Ce	nt Waximum Rat	Maximum Rate
New Hampshire	6	6	Forfeiture of three times all interest in excess of 6 per cent
New Jersey	6	6	Forfeiture of all interest
New Mexico		12	Forfeiture of interest in excess of legal rate
New York	6	6	Forfeiture of principal and interest
North Carolina .	6	6	Forfeiture of all interest and penalty also if paid
North Dakota	7	12	Forfeiture of all interest; also a penalty if paid
Ohio	6	8	Forfeiture of all excess of interest over legal rate
Oklahoma	6	, 10	Forfeiture of all interest; twice amount of interest paid may be recovered
Oregon	6	10	Forfeiture of entire debt
Pennsylvania		6	Forfeiture of all interest in
			excess of legal rate
Rhode Island	6	on all amounts in	All contracts in violation are
		excess of \$50	
South Carolina	7	7	Forfeiture of all interest
		except on written	
		contracts 8 per cent	
South Dakota		may be charged	Forfeiture of all interest
Tennessee		6	Forfeiture of all interest in
1 chilessee		· ·	excess of 6 per cent
Texas	6	'IO	Forfeiture of all interest.
2 0.100			Twice the amount of inter-
			est paid may be recovered
Utah	8	12	Forfeiture of principal and interest
Vermont	6	6	Forfeiture of all interest in
, 0.1110111			excess of 6 per cent
Virginia	6	6	Forfeiture of all interest
Washington		12	Forfeiture of accrued inter-
			est. Twice the amount of interest paid may be recovered

State	Legal Rate Per Cent	Maximum Rate Per Cent	Penalty for Exceeding Maximum Rate
West Virginia	6	6	Forfeiture of all interest in
Wisconsin	6	10	excess of 6 per cent  Forfeiture of all interest.  Treble the amount of inter-
Wyoming	8	12	est paid recoverable Forfeiture of all interest

### H

### Contracts in Breach of the Common Law

§ 125. Rule.— A contract forbidden by the common law (that which came from England) will neither be enforced nor will damages be granted for its breach, unless the common law rule covering the particular contract has been abrogated by statute. Of the many contracts forbidden by the common law, we shall consider only contracts to commit crimes and contracts to defraud creditors.

§ 126. Contracts to Commit Crimes.— "A crime is a wrong which the government notices as injurious to the public and punishes in what is called a criminal proceeding in its own name." A contract to commit a crime is forbidden by the common law and such a contract is invalid.

## **EXAMPLE:**

Allen offered to pay Baker \$500 if Baker would assist in robbing the Third National Bank of Beatrice, Nebraska, on the night of March 2, 1910. Baker accepted the offer, but when the time came to commit the crime he refused to assist Allen. Allen would have no legal recourse against Baker, for the contract was illegal.

§ 127. Contracts to Defraud Creditors.— A debtor is one who owes money. A creditor is one to whom money is due. A contract to defraud a creditor is one the purpose of which is to enable the debtor unlawfully to escape payment of money which he owes to creditors. Any contract

<sup>(</sup>b) Bishop on Criminal Law, § 43.

of this character is forbidden by the common law and also by statutes in many States, and is therefore illegal; and the creditors can have such a contract, if executed, set aside.

### **EXAMPLE:**

Allen owed \$10,000 to his creditors. His entire possessions consisted of \$20,000 worth of diamonds. In order to escape paying his lawful debts, Allen made a contract with Baker, his clerk, whereby it was agreed that Baker was to take all of Allen's diamonds to another State, to dispose of them at the best possible price and to hide the money received from the sale. In consideration for this service Baker was to receive \$1,000. Such a contract is held illegal by the common law and neither party can recover damages for its breach. Moreover if the creditors of Allen can discover where the property or the money has been hidden, upon instituting the proper proceedings, they can have a receiver appointed to take charge of it for the purpose of applying it to the payment of the debtor's obligations.

### III

# Contracts Contrary to Public Policy

§ 128. Public Policy Explained, Rule Given.— It is very difficult to give an exact definition of public policy. A fairly good statement would be that public policy, or, as it is often termed, the policy of the law, consists in those principles of law which hold that no person may lawfully do that which has a tendency to be injurious to the public or to the public good. It must be stated, however, that courts differ widely as to just what comprises the public policy of the State and also as to what contract violates that policy. In a general way it may be said that contracts which tend to injure the government, to encourage litigation, to violate good morals, to affect the freedom or security of marriage, or to restrain the freedom of trade are contrary to public policy and therefore invalid. Of this group we shall consider only contracts which tend to injure the government and contracts in restraint of trade.

§ 129. Contracts Which Tend to Injure the Govern-

ment.— Any contract the purpose of which is to influence improperly executive, legislative, or judicial action or to influence elections or to compound (excuse for a consideration) offenses against the law or to assign the whole or part of the emoluments of a public office, is said to be a contract which tends to injure the government and is, therefore, invalid.

### **EXAMPLES:**

1. Allen was a brother-in-law of Judge Baker. Allen made a contract that, in consideration of \$500 which Carter was to pay, he (Allen) would induce his brother-in-law, Judge Baker, to decide a certain case in favor of Carter. Such a contract is contrary to public policy and is therefore invalid.

2. Allen saw Baker kill Carter. Allen contracted with Baker that he (Allen) would not disclose to the public authorities the fact that Baker had killed Carter, in consideration for which Baker promised to pay Allen \$5,000. Such a contract is contrary to public

policy and is invalid.

§ 130. Contracts in Restraint of Trade.— A contract is in restraint of trade if by its provision it is stipulated that parties shall abstain from the exercise of a particular lawful trade, business, or vocation. At the common law such contracts were held invalid even if the restraint (limitation) was only partial; i. e., if the restraint was limited to a small territory or to a short length of time, but at the present day, it is held that if the restraint is reasonable then the contract is valid. It is difficult to say just what shall be construed a reasonable and what an unreasonable or unlawful restraint. Inasmuch as contracts in restraint of trade (except under certain statutes) almost always arise through the fact that a party who was buying out the business or professional practice of another wishes to protect himself from being taken advantage of by the seller, perhaps a correct statement of the rule as to the reasonableness would be that, if the restraint applies to a specified limited territory, which territory is not larger than is necessary to protect the purchaser in the enjoyment of the good will of the

business or professional practice which he has purchased, then the restraint is reasonable, otherwise not so.°

- § 131. Reasons for Rule.— The reasons of public policy on which the rule that contracts in unreasonable restraint of trade are invalid is founded have been well stated by Professor Lawson:
- (1) "Such contracts diminish the means of the parties

  \* \* of procuring their livelihood and that of their
  families.
- (2) "They tempt improvident persons for the sake of present gain to deprive themselves of the power to labor in the future.
- (3) "They deprive the public of the services of men in the employments in which they may be most useful to the country as well as to themselves.

(4) "They discourage industry and enterprise and

diminish the products of ingenuity and skill.

(5) "They prevent competition, enhance prices, and expose the public to the evils of monopoly." d

### **EXAMPLES:**

1. Allen, the owner of a mill in Marion, Indiana, sold his mill to Baker. In the contract of sale it was stipulated that Allen was not to conduct a mill within 30 miles of Marion, Indiana. Such a stipulation did not render the contract invalid inasmuch as it was reasonable. If Baker had not protected himself in this way Allen might have started a mill a block from the old mill and got back all his old customers and thus have ruined Baker. Cf. Bowser v. Bliss, 7 Blackford's Reports (Indiana) 344.

2. Allen, a physician, sold out his practice to Baker. In the contract of sale it was stipulated that Allen should never again practice medicine. Allen was paid \$1,000 for his practice. Six months after this contract Allen began to practice medicine again. Baker would have no legal recourse against Allen notwithstanding that Allen had paid the \$1,000 for Baker's practice, because the stipulation not to practice Allen's profession forever was unreasonable.

- (c) Cf. Thayer's Synopsis of the Law of Contracts, § 102.
- (d) Lawson on Contracts, § 324.

## **QUESTIONS**

- I. What is the fifth essential of every valid contract?
- II. Is a contract forbidden by the written law valid?
- III. What is a wagering contract?
- IV. Allen made a contract with Baker in which it was stipulated that if Mr. Thompson was elected governor of the State of Kansas then Allen would have to pay Baker \$50, but if Mr. Johnson was elected governor then Baker would be obliged to pay Allen \$50. Is this contract valid and, if so, why?
  - V. Allen, being desirous of visiting his aged father who lived in the country, made a contract with Baker on Sunday, March 6, 1910, in which Allen agreed to pay \$5 for the use of a horse and buggy whereby he could drive out to his father's farm.

    Was this a valid contract?
- VI. Allen made a contract with Baker in St. Louis, Missouri, in which contract it was stipulated that Baker was to pay Allen interest at the rate of 10 per cent per year for the use of \$500 which Baker had borrowed. Was this a valid contract? Suppose Baker refused to pay the interest. Would Allen have a legal right to collect it?
- VII. Allen contracted to pay Baker \$1,000 provided that Baker would forge Carter's name to a note. Baker forged Charter's name and then Allen sold the note to Donald. Baker demanded from Allen the \$1,000 agreed upon, but Allen refused to pay it. Discuss the merits or demerits of Baker's claim.
- VIII. What is a contract to defraud creditors?
- IX. Allen had ten creditors to whom he owed the sum of \$50,000. Allen's brother-in-law, Baker, who knew all about Allen's debts, made a contract with Baker in which it was stipulated that

Baker was to pay Allen \$1,000 for Allen's entire stock which was worth at least \$40,000. Allen transferred the stock to Baker for the \$1,000 and then Allen offered to pay his creditors the \$1,000 which he said was all the money he had. If you were the attorney for the creditors what would you advise them to do?

X. What is meant by the public policy of a State?

XI. What is a contract which tends to injure the government?

XII. Allen, a business man, made a contract to pay Baker, a Congressman of the United States, the sum of \$1,000, for which Baker was to use his influence to get a certain bill passed in Congress. What have you to say of such a transaction?

XIII. Allen, a gentleman who was running for the office of prosecuting attorney, in Chicago, Illinois, agreed to give Baker, a well-known politician of Chicago, half of the fees made in the office of prosecuting attorney, if Baker would use his influence to have Allen elected. Baker used his influence, Allen was elected, and then he refused to fulfill his contract with Baker. What legal remedy has Baker?

XIV. What is a contract in restraint of trade?

XV. What is meant by a reasonable restraint?

XVI. Allen, a dry goods merchant, sold out his business to Baker. In the contract of sale it was stipulated that Allen was not to go into the dry goods business anywhere in the world for a period of ten years. Is this restraint reasonable? Why?

XVII. Allen, a druggist, sold out his drug business to Baker, and in the contract of sale it was stipulated that Allen was not to go into the drug business within ten blocks of his old location for the rest of his life. Is this restraint good? Why?

### REFERENCES

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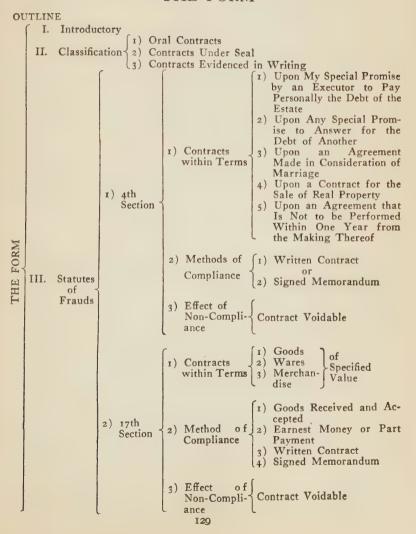
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### CHAPTER X

## THE FORM



§ 132. Introductory

§ 133. Contracts under seal

§ 134. Contracts evidenced in writing § 135. Simple contracts required to be in writing

§ 136. Fourth section of the Statute of frauds

§ 137. Contracts within the terms of the Fourth section:

- (1) A contract by an executor to pay personally the debt of the estate:
- (2) A contract to answer for the debt of another;
- (3) A contract based upon the consideration of marriage;
- (4) A contract relating to the transfer of real property;
- (5) A contract impossible of performance within one year from the date of making;
- § 138. Seventeenth section of the Statute of Frauds

Contracts Within the Terms of the Seventeenth Section

139. Goods, wares, and merchandise

§ 140. Statutes vary as to amount

141. Contracts for work and labor

Choice of Ways to Comply With Seventeenth Section

- § 142. Goods received and accepted, earnest money or part payment made, or written evidence
- § 143. Fourth and Seventeenth sections similar
- § 132. Introductory.— The five essentials to a contract discussed in the preceding five chapters, namely, competent parties, agreement, real consent, consideration, and legality, are the necessary elements to every enforceable contract, but, as has been previously indicated, in some contracts a sixth essential is necessary in addition to the other five, namely, certain contracts are required by law to be under seal and certain contracts must be evidenced in writing even though no seal be necessary. This sixth essential is usually spoken of as the "form" of the contract.
- § 133. Contracts Under Seal.— At the common law the contracts of corporations and all conveyances of real estate 1 were not valid unless under seal. At the present time, however, it is held in most of the States that a corporation can
- (1) For present purposes it is sufficient to say that real estate consists in land or anything that is a part of land, for example, buildings or mines.

make contracts in the same manner that a natural person can make them, unless there is some special provision in the charter of the corporation to the contrary. The old common law rule as to conveyances of real estate, however, seems still to hold true in many States, and even in those States where the effect of the seal has been abolished, parties buying or selling real estate tenaciously cling to the use of the scroll or the seal.

§ 134. Contracts Evidenced in Writing.— In speaking of contracts evidenced in writing it is not meant that such contracts must have any special form or wording. The purpose of such writing being merely to prevent perjury (false swearing) in proving the contract before the courts, all that is necessary is that the writing set forth in an intelligent manner, the terms agreed upon by the parties. Nor does the term "written" mean only letters produced with a pencil or pen but it includes also typewritten, printed,

and engraved characters.

§ 135. Simple Contracts Required to Be in Writing.—In many of the States the ratification by an adult of a contract made during infancy, and the acknowledgment of a debt barred by the Statute of Limitations 2 must be in writing. So also the assignment of a patent or a copyright must be in writing. But the most important contracts required to be evidenced in writing are those which fall within the terms of what is known as the Statute of Frauds (4th and 17th sections) passed in the 29th year of the reign of Charles II of England (1676), and substantially re-enacted in whole or in part by the various States in the Union. We shall devote the remainder of this chapter to a brief consideration of the 4th and 17th sections of this Statute of Frauds.

§ 136. Fourth Section of the Statute of Frauds.— The

Fourth Section of the Statute of Frauds is as follows:

"No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or whereby to charge

<sup>(2)</sup> Statutes of Limitations are statutes limiting the time within which actions can be brought for either civil or criminal wrongs.

the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof: unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

This section, it will be noted, enacts that in order to bring an action on certain contracts therein enumerated, such contracts, or some note or memorandum thereof, must be in writing and must be signed by the party whom it is desired to hold to the contract, or by his authorized agent (representative). By this it is indicated that the parties may draw up a complete contract, if they so please, or they may merely draft an informal instrument which, however, should contain all the terms of the contract. Just what must be in this memorandum has been the subject of much controversy both in England and the United States. The proper thing to do, if one does not care to draw up a complete contract, is to state definitely in the memorandum the names of the parties to the contract, the subject matter, the consideration, and all the terms verbally agreed upon, and to this memorandum should be attached the signature of the party who is to be held responsible.

§ 137. Contracts Within the Terms of the Fourth Section.— The following contracts come within the terms of the fourth section:

- (1) A contract of an executor or administrator 3 to
- (3) Both executors and administrators look after the estates of deceased persons and there is practically no difference in their functions. When a person is appointed in the will of the deceased he is called an executor, but when no will is left or in cases where a will is left, but no one is specified in the will to look after the dead man's estate and the court is thereupon called to appoint someone, such appointee is designated an administrator.

pay out of his own private funds the debts of the estate he is administering.

(2) A contract to answer for the debt, default, or miscarriage of another. The following will make this clear:

A promise by Allen to Carter that if Baker, who owes Carter money, fails to pay the money, then he (Allen)

will pay the debt.

- (3) A contract based upon the consideration of mar-This does not mean that if one party promises to marry another that their contract must be in writing, for such a contract does not come within the terms of the Statute of Frauds and hence if one of the parties fails to fulfil his promise to marry, the other party may sue for a breach of contract. But this clause of the fourth section has reference only to those cases in which one of the parties who proposes marriage promises to give the other party something of value if the other party will marry him (or her), or to those cases in which some third person promises to give something of value to one or both of the parties to the proposed marriage provided they actually marry. In these cases the promise to give something of value must be in writing and the marriage must actually take place before a successful suit can ordinarily be brought on the contract.
- (4) A contract relating to the transfer of real property (lands, houses, and the like) or referring to the grant of any interest in real property. This means that contracts for the sale or lease of real property, or contracts for the sale of growing trees which the purchaser has to cut down himself, or contracts for the right of a buyer to work a mine, must be in writing if one wishes to be safe in having a right of action against the other party to the contract should he fail to do that which he agrees. Leases for a period of less than one year are by statute in some of the States excepted from this fourth clause of the fourth section.

(5) A contract which, by its terms, is impossible of complete fulfilment within one year from the time of the making of the contract. If a contract is dependent upon an uncertain event, and if thus by any possibility the contract might be performed within the one year from its making, then such a contract need not be evidenced in writing; otherwise, it must be so evidenced.

#### **EXAMPLES:**

- r. Allen, the executor of Baker's estate, had always been a very dear friend to Baker. When Baker died he had a great many debts and but little property. In consideration for the affection which Allen felt for the good name of his departed friend, Allen promised that out of his own pocket he would pay Carter a debt of \$500 which Baker, at his death, owed Carter. Allen did not put his promise in writing. If Allen so chooses, he need not pay Carter the \$500, as his promise to pay out of his private funds the debt of the estate which he was administering must be evidenced in writing to be enforceable.
- 2. Allen contracted to sell Baker a piece of property for the sum of \$5,000, but no memorandum of the contract was made. Allen could not be held liable if he refused to carry out his contract inasmuch as it was not evidenced in writing.
- 3. On Jan. 2, 1910, Allen contracted that he would work for Baker for one and one-half years for the sum of \$20 per week. Such a contract should be evidenced in writing since, by its terms, it could not be performed within the one year from the time of the making of the contract.
- § 138. Seventeenth Section of the Statute of Frauds.—The 17th section of the English Statute of Frauds reads as follows: "No contract for the sale of any goods, wares, or merchandise, for the price of ten pounds sterling (about \$50) or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part payment, or some note or memorandum in writing of the same bargain be made and signed by the parties to be charged or their agents thereunto lawfully authorized."

The questions that arise under the 17th section are as follows:

- (1) What contracts are included within this section?
- (2) What choice does this section offer? and
- (3) What results follow from the failure to comply with this section?

# Contracts Within the Terms of the Seventeenth Section

§ 139. Goods, Wares, and Merchandise.— The expression "goods, wares, and merchandise" includes all objects of traffic and commerce in movable articles, e. g., groceries, flour, wearing apparel, electric apparatus, paints, promissory notes, musical instruments, household furniture, horses, cattle.

§ 140. Statutes Vary as to Amount.— By the English statute it will be noted that only contracts for the sale of goods, wares and merchandise of the value of ten pounds sterling or more come within its terms. The statutes of the States differ as to the stipulations in regard to value. Some of the statutes include all contracts for the sale of goods, wares, and merchandise of any value whatsoever. Again, other States include only contracts for the sale of articles for \$200 or more, thereby excluding all contracts involving a smaller amount. But the majority of States fix the minimum amount at \$50.

§ 141. Contract for Work or Labor.— "A contract for work or labor is not within the statute; but where one agrees to manufacture an article for another the courts have found it hard to determine whether the contract is for work (and) labor, or for 'goods, wares, and merchandise.' "a In England and some of the States it is held that if, when completed, "goods, wares, or merchandise" are to be transferred, then the contract is within the statute and the terms of the statute must therefore be complied with. In New York and a few of the States it is held that if the articles are not yet in existence at the time of making the contract but must be manufactured, then the contract is not within

<sup>(</sup>a) Lawson on Contracts, § 86.

the statute and such contract, therefore, need not comply with the terms of the statute. But in Massachusetts and a large number of other States it is held that if the articles are not in existence at the time of making the contract but are such articles as are ordinarily manufactured by the one making such articles, then the contract is within the statute and must comply with its terms, but if the contract is for articles which are to be manufactured specially for the purchaser and upon his special order, then the contract is one for labor, and hence the terms of the statute do not apply.

# Choice of Ways to Comply with Seventeenth Section

§ 142. Goods Received and Accepted, Earnest Money, Part Payment, or Writing.— Unlike the fourth section, which provides that all contracts therein mentioned shall be evidenced in writing, the 17th section gives the parties a choice between three methods of conduct. The contract will be enforceable under any of the following conditions:

(1) If the buyer actually receives a part of the goods and accepts them, i. e., either by words or conduct indicates

that the goods are satisfactory.

(2) If the buyer gives something in earnest, i. e., something of value which the seller is to retain as a forfeit should the buyer fail to carry out his contract; or something in part payment, i. e., something of value which is to be used by the seller to reduce the debt of the buyer.

(3) If the contract, or some note or memorandum thereof is in writing and is signed by the party against whom

the suit is brought or by his agent.

The statement made in § 134 and § 136 with reference to the nature and contents of the memorandum to satisfy the 4th section of the statute have like application to the 17th section.

#### **EXAMPLES:**

1. On January 2, 1910, Allen verbally ordered from Baker \$1,000 worth of shoes. Baker shipped the shoes ordered to Allen on March 1, 1910, but Allen refused to accept them. In such a case, if Allen

pleaded the 17th section of the Statute of Frauds in defense, Baker could not recover damages from Allen for the breach of contract.

- 2. Allen verbally ordered \$500 worth of sugar from Baker. When the sugar was shipped to Allen he took out of the shipment one hundred pounds of sugar and appropriated it to his own use. He then decided that he would not accept the balance of the order. In this case Baker could recover damages for the breach of contract, because Allen had actually received part of the goods and accepted that part. These acts constituted a compliance with the 17th section of the Statute of Frauds.
- 3. Allen verbally ordered 1,000 Cleopatra pianos, worth \$1,000 each, from Baker, and deposited \$50 as earnest money; i. e., with the understanding that should he fail to carry out the bargain he was to forfeit the \$50 to Baker. In case Allen failed to carry out the contract he would not only lose the \$50 earnest money, but would also be liable in damages to Baker for the breach of contract.
- 4. Allen verbally ordered 1,000 Cleopatra pianos from Baker and deposited \$100 in part payment; i. e., with the understanding that the \$100 was to be used to help pay for the pianos. In such a case Allen would be liable to Baker in damages for a breach of contract, but the \$100 would be applied on account of the damages.
- 5. On January 2, 1910, Allen ordered 1,000 Cleopatra pianos from Baker, same to be delivered on March 1, 1910. A memorandum which contained the names of the parties to the sale, the subject-matter of the sale, the price agreed upon, and the dates when delivery was due was made and was signed by Allen only. Should Allen fail to carry out his contract Baker could bring a successful action against him for the breach of contract, for Allen had signed the memorandum. If, however, Baker did not comply with the terms of the contract, Allen would not be able to recover damages from him for the memorandum was not signed by Baker the party whom Allen was seeking to hold.

# Effect of Failure to Comply with This Section

§ 143. 4th and 17th Sections Similar.— Although, in England, a failure to comply with the 17th section of the statute makes the contract void, in the United States it is generally held that a failure to comply with the 17th section entails only the same penalty as a failure to comply with the 4th section, namely, the contract is unenforceable

if the party against whom the suit is brought pleads the Statute of Frauds as a defense.

## **QUESTIONS**

- I. What are the five essentials of every contract?
  What is a sixth essential of some contracts?
- II. What contracts had to be under seal at the common law? Which ones under the statute law of the various States?
- III. What is meant by saying certain contracts must be evidenced in "writing"?
- IV. Name some contracts which are generally required to be in writing by the statutes of the various States. Why were such statutes passed?
  - V. What is the purpose of the 4th section of the Statute of Frauds? Of the 17th section? When was the Statute of Frauds first enacted?
- VI. Allen verbally sold Baker five large oak trees, which were standing on Allen's land, for the sum of \$1,000 each, with the understanding that Baker was to go on Allen's land, cut down the trees, and haul them away. When Baker wished to come on the land Allen refused to permit him to do so. Baker now sues Allen for the breach of contract and Allen pleads the 4th section of the Statute of Frauds. Decide the case.
- VII. Allen sold Baker a house for \$4,000, with the understanding that Baker was to pay for the house within five years. A memorandum of the sale was made by Allen reading as follows:

January 4, 1910.

John Allen this day sold to Richard Baker land and house on the northeast corner of Page and Taylor Avenues, St. Louis, Missouri (Lot 44, City Block 4406).

(Signed) JOHN ALLEN.
Allen refused to carry out the contract, where-

upon Baker sued him for damages. At the trial Allen pleaded the 4th section of the Statute of Frauds. Decide the case, giving reasons.

VIII. Allen, an infant, made a contract to sell Baker a farm for \$5,000. The contract was in writing.

Allen refused to carry out the contract, whereupon Baker sued Allen for damages. Decide the case, giving reasons.

IX. Allen sold Baker \$5,000 worth of groceries. The following memorandum of the sale was made:

January 2, 1910.

John Allen this day sold to Richard Baker \$5,000 worth of groceries, same to be delivered on March 1, 1910.

(Signed) JOHN ALLEN.

Allen refused to fulfil his contract, whereupon Baker sued for damages. Allen pleaded the Statute of Frauds. Which section? Decide the case. Suppose Allen wished to fulfil his contract but Baker refused to accept the groceries. Could Baker plead the Statute of Frauds? If so, which section?

X. On January 2, 1909, Allen made a verbal contract with Baker, in which Allen agreed to work for Baker for one year and one day. Allen refused to carrry out his contract, whereupon Baker sued for damages. Allen pleaded in defense the 17th section of the Statute of Frauds. Decide the case, giving reasons.

### REFERENCES

C. Browne, A Treatise on the Construction of the Statute of Frauds

(Little, Brown & Company, Boston) All the works cited under Chapter IV

### CHAPTER XI

## PROOF OF A CONTRACT

OUTLINE

I. Oral Contract Proved by Oral Testimony 1) Written Instrument and Who are Parties Named Signatures of Parties Named Meaning of Technical Terms Latent Ambiguity PROOF OF A CONTRACT Testimony Customs not Contrary to May Be Used to-Terms of Contract II. Written The Circumstances Surround-Prove Contract ing the Making of the Con-Proved by The Absence of any of the Elements of Contract b) But Oral Testimony May Not Be Used to Vary or Contradict the Express Terms of the Written Instrument (1) All Questions of Importance Settled Advisabil- 2) Unnecessary Disputes Prevented ity of Mak- 3) Contradictions and Perjury in Cases of Litigation ing Writ-Avoided 4) Where One Party Is Dead the Written Contract ten Con-May Be Introduced in Evidence Even Though Liv-

- § 144. Advisability and advantage of embodying contracts in written form
  - (1) All questions of importance settled
  - (2) Unnecessary disputes prevented
  - (3) Contradictions in case of litigation obviated
  - (4) Written contract may be introduced into evidence notwithstanding that other party is dead

ing Party May Not Testify Orally

§ 145. Proof of an oral contract

- § 146. Proof of a written contract
- § 147. Oral evidence not admissible to vary the terms of a written instrument
- § 144. Advisability and Advantage of Embodying Contracts in Written Form.— It has been previously indicated that, with certain exceptions, contracts may be made orally and that such contracts will be just as enforceable as those made in writing. But it must be stated that for practical purposes it is by all means advisable to put every contract into writing. Some of the many advantages that are derived from having a contract embodied in written form may be stated as follows:

(1) When a contract is oral the parties are apt to omit definitely agreeing upon some of the terms but when they must state those terms in writing they usually determine all questions of any importance at the time of drawing up the

written instrument.

(2) The writing prevents unnecessary disputes between the parties after partial performance of the contract begins, as to just what was agreed upon and thereby prevents needless litigation.

(3) In case of litigation there is often apt to be conflicting testimony when the contract is oral, due both to misunderstanding and to false swearing, and these contradictions are obviated by having the contract in writing.

- (4) If one of the parties to an oral contract is dead, the other party, in case any dispute with the executor or administrator of the deceased person's estate arises, can not testify as to the terms of the contract. But if the contract is in writing the written instrument can be introduced in evidence.<sup>1</sup>
- § 145. Proof of an Oral Contract.— There are several kinds of evidence, such as human testimony and documentary evidence. An oral contract is proved by showing what the parties said. This may be established by the evidence of

<sup>(1)</sup> Evidence is the means by which the truth of a proposition is proved or disproved.

either party to the contract (except, as has been said, if one of the parties is dead the other party is not permitted to testify) or by the evidence of any third person who was present at the time of the making of the contract.

§ 146. Proof of Written Contracts.— When a controversy arises in regard to a written contract the writing itself must be introduced as evidence unless the parties can show that, without fault on their part, the contract has been lost or destroyed, when oral evidence of the contents of the

written instrument may be introduced.

§ 147. Oral Evidence Not Admissible to Vary the Terms of a Written Instrument.— The general rule of evidence applicable to written contracts is that oral evidence can not be introduced to vary the terms of a written instrument. This rule has been established to encourage persons to embody in their written contracts all of the terms agreed upon and to prevent perjury. Although this rule seems to be very simple yet a great deal of litigation has arisen as to its exact meaning. It has been definitely established, however, that one is always permitted to show by oral testimony that, notwithstanding that the contract on its face purports to contain the first five essentials of an enforceable contract herein previously stated, yet as a matter of fact that the contract does not contain one or more of these essentials. Of course, one charged with having signed a contract may prove that the signature to the contract is not in fact his own and that he never authorized anyone to place it on the contract. It is settled that a party may prove that an instrument purporting to be a contract is only a part of the contract made; and the courts have repeatedly held that oral testimony may be introduced to explain the terms of a written contract or to show usages of the trade governing the subject-matter of the contract, whenever such usages do not contradict the express terms of the contract. But granting that the complete contract is in writing, that it requires no explanation of its terms, that the party being sued really signed the contract, and that the first five essentials of an enforceable contract, previously given, are present, it has been equally well established that oral testimony may not be introduced to prove that the terms of the contract made were different than the terms embodied in the written instrument.

### **EXAMPLES:**

- 1. Allen made a written contract with Baker who, without any authority from Carter, signed Carter's name to the contract. Carter may prove by oral testimony that he did not authorize Baker to sign his name.
- 2. Allen was compelled at the point of Baker's revolver to sign a written contract. Allen may prove that as a matter of fact he never gave his real consent to signing the contract.
- 3. Allen and Baker made a written contract in which it was stipulated that Allen was to transfer his only house on Washington Avenue, in St. Louis, Missouri, to Baker for the sum of \$5,000. Oral evidence could be introduced to prove just what house on Washington Avenue Allen owned.
- 4. Allen and Baker made a verbal contract in regard to the building of a factory. They then drew up a written instrument which contained only the names of the parties, the fact that a seven-story factory was to be built, and that Baker was to receive \$50,000 for the work upon its completion. In a suit between Allen and Baker on the contract it could be shown that the memorandum made was not the complete contract.

# **QUESTIONS**

- I. Is an oral contract as enforceable as a written one?
- II. Give two reasons why it is advisable to have every contract in writing.
- III. How is an oral contract proved?
- IV. How is a written contract proved?
  - V. May oral evidence be introduced to vary the terms of a written instrument? Why?
- VI. Explain in detail the variations of the parol or oral evidence rule.
- VII. Allen and Baker made a written contract in which it was stated that both parties being of lawful age did thereby make a certain contract. As a

matter of fact Allen was only 17 years of age. In a suit brought by Baker versus Allen, may Allen show that he was an infant when he made the contract?

VIII. Allen and Baker made an oral contract in which it was agreed that Allen was to pay Baker \$5,000 upon the completion of a certain piece of work. A few days after the parties made the contract, they decided to put it in writing, which they accordingly did, but in the written instrument it was stipulated that Baker was to be paid for the work in installments of \$1,000 each, on the completion of certain parts of the work. In a suit on the contract, brought by Baker versus Allen, to recover the first installment of \$1,000, may Allen show that it was orally agreed that he was not to pay Baker until the entire work was completed?

IX. Allen made a contract with Baker in which it was stipulated that Allen was to deliver to Baker 100 bushels of oats per day at 60 cents per bushel. Nothing was said in the contract as to whether the oats were to be delivered in bulk form or in sacks, but the usage of the trade in the community in which the contract was made was that oats were to be delivered in sacks provided that no other way was agreed upon. In an action on the

contract could such a usage be shown?

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J. D. Lawson on Contracts, Chapter IX
(F. H. Thomas Law Book Co., St. Louis)
Wigmore's Greenleaf on Evidence, §§ 275-305,
333 (B)
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## CHAPTER XII

# INTERPRETATION OF CONTRACTS

OUTLINE INTERPRETATION OF CONTRACTS I. Who Interprets Contract The Court (1) Carry Out Intention of the Parties 2) Adopt Construction Given Contract by the Parties Themselves 3) Written Portion Has Precedence Over Printed 4) Give Effect to the Whole Instrument II. Rules of In-5) Words Construed According to Popular Meanterpretation ing unless Technical Expressions 6) If Intent is Clear, Grammar and Orthography
Are of Minor Importance
7) If the Terms Admit of Two Meanings, the Court Will Presume the Lawful Meaning Was Intended III. Contract Unenforceable when Intent Is Not Clear

- 148. Intention of the parties
- 149. Who interpret contracts
- 150. Rules of interpretation
  - (1) Carry out intention of the parties
  - (2) Adopt construction given contract by the parties themselves
  - (3) Written portion has precedence over printed
  - (4) Give effect to the whole instrument
  - (5) Words construed according to popular meaning
  - (6) If intent is clear, grammar and orthography are of minor importance
  - (7) If the terms admit of two meanings, the court will presume the lawful meaning was intended
- § 151. Contract unenforceable when intent not clear
- § 148. Intention of the Parties.— The next step after the terms of a contract have been proved is to construe or interpret the contract; i. e., to ascertain the intention of the

parties to the contract as expressed in the language used by them. If the intention of the parties, as expressed in the whole of the contract, is clear, the law has only to give effect to that intention. But if upon hearing the whole contract there seems to be some doubt as to just what the intention of the parties was, then the contract must be in-

terpreted.

§ 149. Who Interpret Contracts.— "The construction (or interpretation) of all written instruments belongs to the court. It may become necessary to ascertain the surrounding circumstances that fill out the meaning of the words, and the ascertainment of these is for the jury. But subject to the implication or precision of the meaning thus ascertained, it is the duty of the jury to take the construction of (a written) instrument from the court. Where a contract is entered into orally, or partly in writing and partly orally, it is usually said that its terms, if disputed, are to be tried by the jury as a question of fact, subject, of course, to instructions as to the legal effect of the words." a

§ 150. Rules of Interpretation.— Certain rules of interpretation which have grown up through a long line of decisions have proved to be very helpful in interpreting contracts. We shall discuss the most important of these rules.

- (1) The first and by all means the most important rule of interpretation is that a contract should be so construed as to carry into effect the intention of the parties; and such intention must be ascertained from the language of the parties and from the facts and circumstances surrounding the making of the contract.<sup>b</sup>
- (2) When the meaning of the contract, considered in its entirety, is uncertain, obscure, or incomplete, and the parties to the contract, for a considerable period, and while under no restraint, have treated the contract as imposing certain duties or obligations, such conduct ought to settle

<sup>(</sup>a) Wigmore's Greenleaf on Evidence, § 61f (4).

<sup>(</sup>b) Mathews v. Phelps, 61 Mich. 327.

the construction of the contract. Thus where a contract between two railway companies operating a joint railway line did not expressly provide how cars should be obtained or supplied for the use of the line, the fact that one company for several years after the contract was entered into, paid the other company for the use of its cars will be considered as a construction placed on the contract by the parties themselves, and the courts will enforce such a payment as if it had been stipulated in the contract.

(3) In the interpretation of a contract of which a portion is printed and a portion written the court will give greater weight to the words written in by the parties than to the words printed, whenever the written and printed parts cannot upon reasonable construction be reconciled. The reason for this rule is that the language of the printed blanks prepared for general use for the public is often assumed by the parties to be appropriate in the particular instance at hand without careful examination, and hence it is not so likely to express the real intention of the parties as the written words specially selected by the parties themselves for the particular transaction.<sup>d</sup>

(4) "The courts will examine the whole of the written contract and will so construe each part with the others that all of them may, if possible, have some effect, for it is to be presumed that each part was inserted for a purpose and has its office to perform." But if the main part of a contract is followed by a proviso which is wholly repugnant to the main part, then such a proviso will be rejected.

(5) In interpreting a contract, the court will construe the words and phrases used, according to their popular meaning if by applying a technical meaning to such words and phrases the manifest intention of the parties will be defeated. Thus when the phrase "hard pan" was used in a contract and there was some doubt as to the technical

<sup>(</sup>c) Central Trust Co. v. Wabash R. R., 34 Fed. Rep. 254.

<sup>(</sup>d) Lawson on Contracts, § 389, Rule IV.

<sup>(</sup>e) Lawson on Contracts, § 381, Rule I.

<sup>(</sup>f) Thayer on Contracts, § 88, Rule V.

geological meaning of those words, the court held that the phrase should be given the meaning applied to it by the people of the neighborhood in which the contract was made.8

(6) No inaccuracy in the use of language, or grammar, or omission of words or phrases intentionally intended to be inserted, will defeat the intent of the parties if that intent is clearly manifested. The courts will not be precise in following the rules of grammatical construction, but will so construe the contract as to accomplish the object for which the contract was made. And a writing, untechnical, ungrammatical, and totally at variance with all the recognized rules of orthography may be valid if the meaning of the parties be sufficiently clear. Thus the word "or" may be read as "and," — "may," as "must," — and "quarterly" as "annually," if necessary to carry out the intent of the parties.h

- (7) If the terms of a contract admit of two meanings, or of two ways of effecting an object, one of which is lawful and the other is unlawful, the courts will presume that the lawful meaning was intended by the parties. Suppose, for example, that a United States statute made it unlawful to print any obscene pictures for the purpose of circulating them through the mails. Allen made a contract with Baker in which it was stipulated that Allen was to print 1,000 obscene circulars for Baker for the sum of \$500. Allen printed the circulars and then Baker refused to pay for them on the grounds that it was an unlawful contract. In all probability the courts would not hold such a contract unlawful (unless there was a definite rule established in the State so holding) because nothing was said in the contract between Allen and Baker that the obscene pictures were to be sent through the mails and the statute only declared that it was an unlawful act to print such literature for the purpose of sending it through the mails.
  - (g) Thayer's Synopsis of the Law of Contracts, § 88, Rule IV.
- (h) Hancock v. Watson, 18 Cal. 137; Cobb v. Hines, 59 Am. Decisions.
  - (i) Thayer's Synopsis of the Law of Contracts, § 88, Rule VIII.

§ 151. Contract Unenforceable When Intent Not Clear.— If after hearing such evidence as is admissible and after applying the rules for the interpretation of contracts, the courts cannot ascertain what reasonably seems to be the intention of the parties the contract will then be declared to be of no effect on the grounds of uncertainty.

## **QUESTIONS**

I. What is the purpose of interpretation of contracts?

II. When does interpretation become necessary?

III. Give three rules of interpretation.

IV. Suppose that, after applying the rules of interpretation, the intent of the parties is not clear, will the contract be enforceable?

V. Allen and Baker made a contract which was embodied

in the following written form:

January 2, 1910.

I, John Allen, will werk 18 monts fer Richard Baker and Baker wil pa me \$50 a mont fer mi tim. JOHN ALLEN.

In your opinion would such a contract be enforceable? If not, why not?

### REFERENCES

Thayer's Synopsis of the Law of Contracts, §§ 88-92 (W. W. Brewer & Co., St. Louis)

Lawson on Contracts, Chapter IX

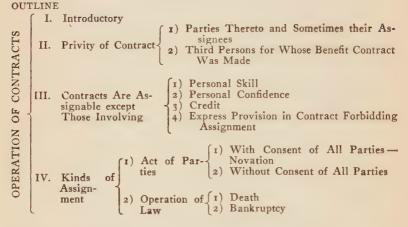
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Wigmore's Greenleaf on Evidence § 81f (4)

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### CHAPTER XIII

### OPERATION OF CONTRACTS



- § 152. Introductory
- § 153. Only parties to a contract have rights and liabilities thereunder
- § 154. Contracts for the benefit of third persons

# (1) Assignment by Act of Parties

- § 155. Novation
- § 156. Assignment without consent
- § 157. Assignment of right to recover money or property

# (2) Assignment by Operation of Law

- \$ 158. Assignment based on death
- § 152. Introductory.— This chapter on the operation of contracts includes a consideration of the rights and liabilities growing out of contracts and of the assignment of those rights and liabilities. We shall group the assignment

of contracts under two heads, first, assignment by act of the parties and, second, assignment by operation of law.

§ 153. Only Parties to a Contract Have Rights and Liabilities Thereunder.— All contracts except those created by law are entered into voluntarily. The relation existing between the parties who enter into a contract is known as privity of contract. Inasmuch as this privity exists between contracting parties, the general rule is that third persons who are not parties to a contract, either in person or through their agents, can have no right in such a contract and so also no obligations can be thrust upon them.

#### **EXAMPLES:**

- 1. Allen made a contract with Baker in which Allen promised that Carter would work for Baker for a period of two months for \$25 per month. Carter knew nothing about the contract and had not given Allen any authority, either expressly or impliedly, to make such a contract for him. Carter refused to do the work. Baker would have no right of action against Carter, because there was no privity of contract between Carter and himself; i. e., Carter was not a party to the contract.
- 2. Allen employed Baker as a coachman. In the contract of employment it was stipulated that Allen was not to be liable for any damage caused to third persons while Baker was driving, but that Baker was to be personally responsible for such damage. One day, while Baker was driving Allen's horses on some business for Allen, he carelessly drove over and seriously injured Miss Carter. Miss Carter brought an action against Allen for damages. Allen set up as a defense that Baker, his coachman, had agreed to assume all liability for injuries done. This would not be a good defense, inasmuch as Miss Carter was not a party to the contract between Allen and Baker and she had a perfect legal right to hold Allen, who was the employer of Baker, for the injury caused her. Cf. Texas Railway Co. v. Watson, 190 U. S. 287.
- § 154. Contracts for the Benefit of Third Persons.—Although the general rule is that persons not parties to a contract can have no rights thereunder, yet when two parties enter into a contract for the express purpose of conferring a benefit on some third person and such third person has a

legal or equitable interest in the performance of the contract, then, it is held in the majority of the States that such a third person has rights in such a contract and that he can bring an action on the contract in his own name for the money or other benefit which had been stipulated in the contract for him to receive. This class of cases, it must be said, clearly forms an exception to the rule requiring privity of contract. On the grounds, however, that there is no privity of contract in such cases, the courts in England and in some few of the States have refused to permit the third person to bring the action on the contract.

#### **EXAMPLES:**

I. Allen, the father of an illegitimate child, promised the mother of the child that if she would surrender the custody of the infant for a period of years, he, the father, would educate and support it and would give the child the sum of \$1,000 when it became of age. The woman accepted the offer of Allen and surrendered the child. When the child reached its majority it brought suit against the father's estate for the \$1,000. The court held that the money could be recovered, for there had been an express promise made for the benefit of the child and the child had an equitable interest in the performance of the contract.

2. Allen owed Baker the sum of \$300. Carter asked Allen to lend him the \$300 for one day. Allen agreed to lend Carter the money provided that Carter would promise to pay the \$300 to Baker instead of himself (Allen) on the following day. Carter promised as requested, whereupon Allen loaned him the money. Carter then failed to pay the money to Baker as agreed, whereupon Baker sued Carter. As a defense to the action Carter pleaded that there was no privity of contract between himself and Baker and that, therefore, Baker should not be allowed to recover, but the court held that Baker could recover on the grounds that he had a legal interest in the performance of the contract as the contract was made for his express benefit. Lawrence v. Fox, 20 N. Y. 268.

3. Allen contracted to build a house for Baker. Allen employed one Carter to do some of the work on the house for the sum of \$150. When the time came for the first payment to be made by Baker for the work done on his house, Carter failed to appear, so Allen, the contractor, requested that Baker should retain the \$150 due for

that part of the work and should personally pay that sum to Carter. This Baker promised to do. Later on Baker refused to pay Carter, whereupon Carter sued him for the money due. The court held that, notwithstanding that most of the States permitted a third person for whose benefit a contract was made to recover on the contract, nevertheless, in Massachusetts the law was that he could not recover. Borden v. Boardman, 157 Mass. 410.

### Assignment by Acts of Parties

§ 155. Novation.— After a contract is made one of the parties sometimes wishes to assign his rights and liabilities under it. If the other party to the contract consents to this assignment then no difficulty ordinarily arises, for the assignor, i. e., the party making the assignment, simply drops out of the contract and the assignee, i. e., the party to whom the rights and liabilities are assigned, takes his place. This substitution of a new obligation for an old one which is thereby extinguished, is called a "novation."

#### **EXAMPLE:**

Allen entered into a contract with Baker to build a house for Baker. A few days later Allen found that it would be inconvenient to do the work, so he went to Baker and requested that Baker should release him from his original contract and should substitute one Carter who was willing to take his place. Baker consented to do this, so Carter thereupon assumed Allen's rights and liabilities under the contract. This was a novation.

§ 156. Assignment Without Consent.— The general rule has often been said to be that an executory contract which does not involve personal confidence can be assigned by one of the parties without the consent of the other party to the contract unless there is some provision in the contract to the contrary. But just what classes of contracts do and what classes do not involve personal confidence has long been the subject of controversy and litigation. It is clear, however, that all contracts involving personal skill or knowledge, such as contracts to render professional service, do involve personal confidence and are therefore unassignable

without the consent of the party to the contract. Before giving illustrations of the rule stated in this paragraph it must be observed that even though a party may assign his rights in many executory contracts without the consent of the other party to the original contract, yet his obligations under the contract still remain so far as the other original contracting party is concerned unless he is expressly released by said party.

#### **EXAMPLES:**

- 1. Allen entered into a contract with Baker in which it was stipulated that Baker was to deliver to Allen certain printing dies for which Allen was to pay Baker the cash sum of \$500 on delivery. Before the dies were delivered Allen assigned his contract to Carter without the consent of Baker. It was held that Allen could do this inasmuch as the contract was not purely personal, for anyone could pay for the dies when they were delivered. If, however, in this case Baker had tendered the dies to Carter, the assignee of Allen, and Carter had refused to pay for them then Baker could have sued Allen for breach of contract, inasmuch as he had not released Allen from the terms of the original contract. Cf. Rochester Lantern Co. v. Stiles et al., 135 N. Y. 209.
- 2. Allen contracted to have a number of men dig an oil well on Baker's land for a certain sum of money. The personal skill or personal supervision of the work was not contemplated by the parties at the time the contract was made. Allen assigned his contract to Carter who immediately had the well dug in a workmanlike manner. Baker refused to pay for the work on the grounds that he had not contracted with Carter, but the court held that the contract between Allen and Baker was an assignable one and therefore Carter could recover. Galey v. Mellon, 172 Pa. St. Rep. 442.
- 3. Allen made a contract to act as an attorney for Baker for one year for the sum of \$2,000. Allen could not assign his contract to anyone else without the consent of Baker, inasmuch as it involved personal knowledge and skill.
- 4. Allen contracted to deliver meat to Baker, a hotel keeper, at a stipulated sum, for a period of one year. The meat was to be paid for on the first of each month after its delivery. Baker sold his hotel to Carter and assigned to Carter the particular contract, previously mentioned, for the purchase of meat. Allen refused to deliver meat to Carter, whereupon Carter brought suit against him

for breach of contract. The court held that, inasmuch as the meat was sold on credit, there was a personal confidence involved and therefore the contract could not be assigned without Allen's consent. Cf. Lansden v. McCarthy, 45 Mo. 106.

§ 157. Assignment of Right to Recover Property or Money.— If one of the parties to a contract has performed the services stipulated for and has a money claim against the other party for the services rendered or goods delivered, he may assign such a claim which is technically called a chose in action to any third person.¹ Such a third person must, however, immediately give notice of the assignment to the debtor in order to protect himself, for, if he fails to give such notice and the debtor pays the assignor, then such payment will constitute a valid defense in an action by the assignee versus the debtor. But if notice is given, then the debtor is bound to pay the assignee and, if he fails to do so, the assignee has a valid cause of action against him, for the money due.

#### **EXAMPLES:**

- 1. Dr. Allen acted as physician for Mr. Baker for a period of one year, whereupon by the terms of their original contract the doctor was to receive \$3,000. At the end of the year Dr. Allen transferred his claim to the \$3,000 to Carter who duly notified Baker of the transfer. This was a perfectly valid transaction and Carter could recover the \$3,000 from Baker.
- 2. Allen delivered merchandise to Baker for which Baker agreed to pay the sum of \$1,000 within six months. Allen assigned his claim to Carter but failed to give notice of the assignment. At the end of six months Baker paid Allen the \$1,000. Carter would have no legal right of action against Baker, inasmuch as he (Carter) had failed to give Baker notice of the assignment. Carter could, however, recover the \$1,000 from Allen on the grounds that Allen had assigned the claim for that amount to him (Carter) and, therefore, he (Allen) should either not have accepted the money from
- (x) We shall consider the question of promissory notes and other negotiable instruments in a separate chapter and shall therefore not include a discussion of those subjects at this time.

Baker or should have accepted it and then immediately have paid it over to Carter.

## Assignment by Operation of Law

§ 158. Assignment Based on Death.— Under assignment by operation of law we shall consider only assignment based on death. At the death of a person all his contracts in regard to his personal property, except those involving personal confidence or personal skill and knowledge, are assigned by operation of law to his executors and administrators.<sup>a</sup>

#### **EXAMPLES:**

- 1. Allen, who was the proprietor of a coal business, contracted to deliver to Baker 100 tons of coal at 11c per bushel. Ten days after making this contract Allen was killed. The contract here mentioned for the delivery of coal was assigned by operation of law to Allen's executors and administrators, who would be obliged to fulfill the contract.
- 2. Dr. Allen contracted to act as the physician for Baker for one year from the date of making the contract. Four months after that time Dr. Allen died. This contract would not be assignable by operation of law.

#### **QUESTIONS**

- I. What parties have rights and liabilities under a given contract? What is the reason for this rule? Give an original example illustrating the rule.
- II. What rights have third persons, for whose benefit a contract is made, under such contracts?
- III. What is a novation?
- IV. Give an original illustration of a novation.
  - V. Are executory contracts assignable?
- VI. What classes of contracts involving personal confidence are assignable?
- VII. If a contract for professional service has been fully performed by the professional man, can he assign the right to recover the money due him?
  - (a) Woerner on Administration, § 328.

- VIII. What classes of contracts are assigned by operation of law on account of death?
  - IX. The City of Chicago awarded a contract to Allen in which it was stipulated that a certain bridge was to be built in accordance with certain printed specifications. A large number of contractors had bid on the contract and Allen had been awarded it, not because of his financial standing, but simply because he had put in the lowest bid. Allen assigned his contract to Carter, who did the work in accordance with the specifications. Could Carter recover for the work done?
    - X. Allen made a contract with Baker in which it was stipulated that Allen was to deliver to Baker 400 books for the sum of \$600. Baker assigned his contract to Carter without the consent of Allen. Carter notified Allen that Baker had assigned the contract to him (Carter). When Allen tendered the books to Carter he refused to accept them. Allen thereupon brought suit against Baker for breach of contract. Decide the case.

#### REFERENCES

A. Thayer's Synopsis of the Law of Contracts, §§ 244-248

(W. W. Brewer & Co., St. Louis)

J. D. Lawson on Contracts, Chapter VIII

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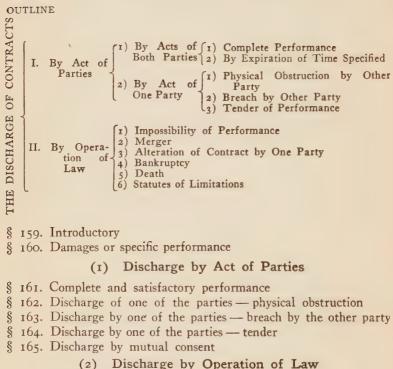
2 American and English Encyclopedia of Law (Edw. Thompson & Co., Newport, R. I.)

4 Cyclopedia of Law and Procedure

(American Law Book Co., New York)

#### CHAPTER XIV

#### THE DISCHARGE OF CONTRACTS



(2) Discharge by Operation of Law

§ 166. Impossibility of performance

§ 167. Merger

§ 168. Alteration of a written contract by one of the parties

§ 169. Discharge by bankruptcy or by death

§ 170. Discharge by Statute of Limitations

§ 159. Introductory.— Up to this point we have discussed the essentials necessary to the formation of an en-

forceable contract, the manner of proving the terms of a contract, the operation of a contract and its interpretation. It now becomes necessary to consider the discharge of the contract, i. e., the method of untying the contractual knot. A contract is discharged either by the act of the parties or by operation of law.

§ 160. Damages or Specific Performance.—Before specifying particularly the methods of discharging a contract, and in order to make what follows more easily understood, it is necessary to digress for a moment to discuss the measure of damages for breaches of contracts, and also specific performance of contracts. In contracts, damages may be said to be pecuniary reparation which the law compels the one breaking the contract to make to the other party. The theory upon which damages are awarded is that they are a compensation to the one injured, - not as a punishment to the wrongdoer. The amount of damages which are given for the breach of contracts is in all cases, except for the loan of money,1 first, such damages as would ordinarily arise from the breach of the contract, and, second, such damages as arise from special circumstances, provided those special circumstances were communicated at the time when the contract was made by the party seeking to recover the damages to the other party. Although as a general rule the courts will give only money damages for the breach of contracts, yet whenever, because of the peculiar circumstances of the case, money damages would be wholly inadequate to compensate the injured party, such party may go into a Court of Equity and get a decree of specific performance, i. e., an order of court commanding the party who refuses to perform his part of the contract to do so, and if such party fails to perform he may be imprisoned for contempt of court, and in such a case he is not entitled to a trial by jury. But specific performance is not decreed to compel

<sup>(1)</sup> In cases of failure to return money borrowed the damages are computed on the basis of the lawful rate of interest for the use of such money.

<sup>(</sup>a) Hale on Damages, § 2.

<sup>(</sup>b) Hadley v. Baxendale, 9 Exchequer (England), 341.

a party to do a personal service, such as to work for another man, to sing at a concert, or to perform in a theater.

#### **EXAMPLES:**

- 1. Allen made a contract with Baker, in which Baker agreed to deliver to Allen a certain kind of wagon which was ordinarily used for carrying coal, and Allen agreed to pay \$50 for the wagon. Allen would have made \$5 a day from the use of the wagon for carrying coal. Baker failed to deliver the wagon as he had agreed to do. Now, as a matter of fact, Allen had intended to use the wagon to carry large quantities of groceries, and by this means he would have made a profit of \$10 per day. But Allen failed to communicate to Baker the purpose for which he wished to use the wagon. In such a case Allen could recover in damages only the loss that he sustained by not having the wagon for the purpose of carrying coal, namely \$5. But if, at the time he gave the order for the wagon he had communicated to Baker the fact that he intended to use the wagon for carrying groceries, then he could have recovered the real loss caused him, namely, \$10 per day.
- 2. Allen borrowed \$10 which he agreed to repay to Baker in two days. He failed to return the money, hence Baker brought suit against him. Baker can recover only the \$10 plus interest at the legal rate.
- 3. In a given contract Allen agreed to sell Baker a certain piece of land for the sum of \$5,000. Allen failed to carry out his contract, whereupon Baker went into a Court of Equity, and demanded a decree of specific performance to compel Allen to transfer the title to the property. In cases for the transfer of land, a Court of Equity will usually issue a decree of specific performance. Cf. Adams v. Messinger, 147 Mass. 185.

### Discharge by Act of Parties

§ 161. Complete and Satisfactory Performance.— Returning now to the methods of discharging a contract, the rule is that if the parties to a contract fully perform what was agreed upon, and do so in a lawful manner, the contract is then discharged and no further rights or liabilities can arise therefrom.

#### **EXAMPLE:**

Allen contracted to build a house for Baker for the sum of

\$5,000. Allen built the house in an entirely satisfactory manner and Baker paid Allen the money. The contract was thereupon discharged.

§ 162. Discharge of One of the Parties, Physical Obstruction.— Very often one of the parties to a contract is discharged from liability thereunder while the other party is still liable. If, for example, one of the parties wishes to carry out the contract but the other party puts such physical obstructions in the way that the former party cannot perform, then the party who is unable to perform because of the physical obstruction would be discharged from liability under the contract, but the party who wilfully created the obstructions would be liable in damages for his breach of contract.

#### **EXAMPLE:**

Allen made a contract with Baker in which it was stipulated that, for the sum of \$500, Allen was to go onto Baker's land, cut down certain trees, haul them to the lumber market, sell them, and turn the money over to Baker. Allen came prepared to perform his part of the contract. Baker threatened to shoot Allen if he came onto his (Baker's) land. Here Allen would be discharged from liability under the contract but Baker would be liable in damages for the breach. Cf. Woodberry v. Warner, 53 Ark. 488.

§ 163. Discharge of One of the Parties; Breach by the Other Party.— If, before the time comes due for performance of his part of the contract by one of the parties, he notifies the other party that he does not expect to perform, such other party may then immediately sue for breach of contract, or, if he chooses, he may wait until the time for performance comes due, then demand that performance be made, and if at that time the first party still refuses to perform, the second party may then bring his suit for the breach of contract, or sometimes for specific performance. In case of breach of contract by one party, the other party is usually discharged from carrying out his part of the contract and he is not liable for the failure to do so. But if he asks a

Court of Equity to compel the other party specifically to perform the contract, he must then be prepared also to fulfill his obligations in the contract.

#### **EXAMPLE:**

In a contract made on January 2, 1910, between Allen and Baker, it was stipulated that Allen was to build a house for Baker for the sum of \$5,000, the work to begin on February 1, 1910. On January 15th, Allen notified Baker that he (Allen) would not build the house as he had agreed to do. Baker thereupon immediately employed Carter to build a house similar in construction to the one which Allen had contracted to build, but Baker was obliged to contract to pay Carter \$6,000 for the work. If the figure of \$6,000 was a reasonable one, Baker could then immediately sue Allen for the breach of contract resulting in the loss of \$1,000 to himself. But if Baker so desired he might have waited until February 1, 1910, then requested Allen to fulfill his contract, and if, at that time, Allen had refused, Baker could have then brought suit for the breach of contract. Or, again, if Baker, after receiving the notification from Allen on January 15th that he would not carry out the contract, had decided not to build the house and not to sue Allen for the breach of contract, he might have pursued that course. In the latter case, Baker would have been under no liability whatever to Allen, for Allen by his refusal to perform the contract had thereupon discharged Baker from performing.

§ 164. Discharge of One of the Parties; Tender.—Very often one of the parties to a contract tenders performance, i. e., makes an unconditional offer to perform his part of the contract, but the other party refuses to accept the tender. Where it is a contract for personal service, the party making the tender is ordinarily excused from performing any further work under the contract. But where it is an obligation to pay money, the refusal of the tender of the money does not release the debt, but it may stop the payment of interest and court costs.

#### **EXAMPLES:**

1. In a contract between Allen and Baker it was stipulated that

Allen was to deliver to Baker 500 bushels of wheat at \$1 per bushel on January 1, 1910. On the date mentioned Allen tendered the 500 bushels of wheat but Baker refused to accept them, whereupon Allen sold the wheat to Carter. This he could lawfully do. If the market price of the wheat on January 1, 1910, was less than the amount which Baker had agreed to pay, Allen could recover the difference in price from Baker. Cf. Knight v. Abbott, 30 Vermont 577.

- 2. As a result of a contract between Allen and Baker, Baker owed Allen \$1,000. Baker tendered the money to Allen who, for some trivial reason, refused to accept it. If later on Allen sued Baker for the \$1,000 inasmuch as the money was lawfully due, Allen would have to pay the \$1,000, but the court costs of the suit would have to be borne by Allen, because it was his fault that the money had not been paid previously.
- § 165. Discharge by Mutual Consent.— If, while a contract is wholly executory, the parties mutually agree to release each other from liability they may do so. They will then have no further rights under the contract and they will also be discharged from all liability thereunder. If, however, one of the parties to the contract has partly performed or has completely performed, and thereupon certain money has become due him, his release of the other party, if not based upon a valuable consideration (or under seal, in those States where a seal imports a consideration) will not be binding. But the rule that a party to a contract who has partly or fully performed cannot legally release the other party to the contract from liability thereunder without a consideration, does not prevent the former party from making a gift of the money due him to the latter party.

#### **EXAMPLES:**

1. Allen contracted to deliver to Baker groceries for which Baker was to pay \$50. Before the time for delivery Allen and Baker mutually agreed to release each other from the contract previously made. This they may do and thereupon all rights and liabilities under the previous contract will be extinguished.

2. Allen contracted to deliver to Baker 400 books at \$1 each. Allen delivered the books and then, without any consideration, released Baker from paying for them. A few days later Allen and Baker had

a quarrel, whereupon Allen demanded that Baker pay for the books. This he may lawfully do as his release of Baker was not based upon a valuable consideration. If, however, Baker had done something for Allen in return for the release, then the release would have been binding.

## Discharge by Operation of Law

§ 166. Impossibility of Performance.— If, after a contract is made, a law is passed forbidding the doing of the acts provided for in the contract, the parties are then discharged from the contract by operation of law and have no further rights or liabilities under such a contract. And so, also, if a contract is made with the understanding that it can only be performed provided certain property remains in existence and if then that property, without the fault of either party, is destroyed, the parties are thereby released from such a contract.

#### **EXAMPLES:**

- 1. Allen and Baker made a contract in which it was stipulated that Allen was to deliver to Baker 5,000 kegs of beer at \$10 per keg. When the contract was made it was perfectly lawful, but four days after the making of the contract the legislature of the State passed a statute forbidding the sale of liquor. Inasmuch as the law forbade the parties from carrying out the contract, they are discharged from any liability thereunder. Cf. Louisville v. Mottley, 219 U. S. 467.
  - 2. In a contract between Allen and Baker it was stipulated that Allen was to paint Baker's house. One day after the contract was made the house burned down without any fault of either party to the contract. In such a case both Allen and Baker would be discharged from performing the contract, inasmuch as the contract was made with the implied understanding that the house would continue in existence. Cf. Martin v. Siegel, 237 Ill. 610.
  - § 167. Merger.— If suit is brought for a breach of contract and a judgment is obtained as a result of such a suit, the party guilty of the breach is thereby under no further liability on the original contract inasmuch as his liability

becomes merged in the judgment, i. e., absorbed in the judgment.

§ 168. Alteration of a Written Contract by One of the Parties.— If, after a written contract is made and delivered, one of the parties thereto, without the consent of the other, fraudulently makes a material alteration 2 of the contract, the other party, if he so desires it, will thereupon be discharged from the terms of the contract. But if the innocent party desires to hold the party making the fraudulent alteration to performance of either the contract as originally made, or to the terms of the contract as altered by the guilty party, he may do so.

#### **EXAMPLE:**

In a contract between Allen and Baker it was stipulated that Allen was to deliver 5,000 bushels of wheat to Baker on July 1, 1910, at \$1 per bushel. After the contract was delivered to Allen he changed the number — 5,000 to read 3,000 — without the consent of Baker. Such an alteration would be a material alteration and if Baker so desired it, he could be discharged from the contract; or Baker might hold Allen to the original contract for the delivery of 5,000 bushels or he has a third choice in that he may hold Allen to the contract to deliver 3,000 bushels. Cf. Wessell v. Glenn, 108 Pa. 104.

§ 169. Discharge by Bankruptcy or by Death.— A party who obtains his complete discharge in bankruptcy in the United States courts is thereupon released from all liability under his contracts. Likewise if a party dies, his estate is released from liability on contracts for purely personal service, as has been previously indicated. And in cases where the estate of the dead party is released, the other party to the contract will also be released.

§ 170. Discharge by Statute of Limitations.— The general rule may be said to be that, so far as the validity or legality of a contract is concerned, the law of the place where the contract is to be carried out will govern the con-

<sup>(2)</sup> By "material alteration" is meant some change in the wording of the contract which alters the meaning of the contract or its legal effect.

struction of the contract. But if no special place for carrying out the contract is mentioned, then the law of the place where the contract is made governs. But in the matter of the remedy for breach of contract, the law of the place where the contract is sued upon governs. Now there are enacted in all of the States what are known as Statutes of Limitations, i. e., statutes which provide that a party must bring actions at law for breach of contract within a certain number of years after the breach has occurred; and if such a party does not bring his suit within that time his right of action for such breach of contract will thereupon be discharged by law.<sup>3</sup> It has been repeatedly held that the Statutes of Limitations refer to the remedy on the contract and not to the right of action itself and therefore the law of the place where the suit is brought governs.

#### **EXAMPLE:**

Allen and Baker made a contract in Missouri which contract was to be performed in Illinois. Baker was guilty of a breach of contract. Allen sued Baker eleven years after the breach in Massachusetts. Now let us suppose that the Statute of Limitations of Missouri provides that actions for breach of contracts must be brought within ten years after the breach occurs, that of Illinois twelve years, and that of Massachusetts eight years. In such a case Allen could not recover on the contract in Massachusetts, because the statute of limitations of the forum where the action is brought governs, and we have supposed the statute of Massachusetts to bar recovery. The same would hold true if the action had been brought in Missouri. But had the action been brought in Illinois, the statute would not have barred a recovery.

### **QUESTIONS**

- I. What is meant by the discharge of contracts?
- II. Into what two large groups may the discharge of contracts be grouped?
- III. What are damages, and what is specific performance?
- IV. What are the essential rules for damages in contracts? Illustrate.
- (3) There are also Statutes of Limitations governing crimes and torts.

V. When is specific performance of a contract granted and in what courts must suit for specific performance be brought?

VI. What is discharge by performance?

VII. Explain the rule that if one of the parties has committed a breach of contract the other party is

thereby discharged. Illustrate.

VIII. What is tender? If one of the parties tenders performance of the contract and the other party refuses the tender, what effect has the act of the latter party on the duties of the former?

IX. May a contract be discharged by mutual consent?

If so, illustrate.

X. Give the various ways in which a contract may be

discharged by operation of law.

XI. Give an illustration of discharge by impossibility of performance and discharge by death.

#### REFERENCES

Thayer's Synopsis on the Law of Contracts §§ 261-280.

(W. W. Brewer & Co., St. Louis)

J. D. Lawson on Contracts, Chapters XI and XVIII (F. H. Thomas Law Book Co., St. Louis)

9 Cyclopedia Law and Procedure

See Index to Contracts

(American Law Book Co., New York)

#### CHAPTER XV

#### **FORMS**

OUTLINE

I. In General Affidavits and Acknowledgments 1) Of a Debt 2) For Benefit of Creditors (1) Co-partners 2) Employer and Em-{1) Merchant and Bookkeeper ployee 2) Merchant and Salesman 3) One of Age (to Pay a Debt Contracted in his Infancy) and Creditor between 4) Manufacturer and Customer (1) In General 5) Vendor and Vendee 2) Sale of Practice by a Physi-(3) Sale of Crops (1) General Warranty V. Deeds 2) Quit Claim (1) Of Landlord VI. Notices 2) Of Tenant VII. Releases

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§ 173. Contract between employer and employee

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§ 184. Notices to terminate tenancies

A. Notice of landlord to tenant to terminate tenancy

B. Notice of tenant to landlord to terminate tenancy

§ 185. Affidavits of acknowledgment

A. Affidavits

B. Acknowledgments

§ 171. Introductory.— The forms given in this chapter are only guides and they must, therefore, not be followed slavishly. In order that there may be no break in the reading, fictitious names and dates have been inserted in the forms given. It will also be observed that the last clause in the contract before the place for the signatures of the parties to the contract is a clause which recites that the parties have set their hands and seals to the contract. though a seal, as has been previously indicated, is unnecessary in many States, this clause is still used by many parties in their contracts. And the clause following the signatures, which recites that a contract has been executed and delivered in the presence of witnesses, is also unnecessary unless the statute of the State governing the contract requires such a clause. Many parties, however, follow the practice of having all their written contracts witnessed in order to have no difficulty in proving the contract should the other party later on assert that the signature to the contract was not his.

## § 172. A General Form for Contracts.—

This contract, made and entered into this 4th day of June, A. D., 1910, by and between John Allen, an Attorney-at-Law of the City of St. Louis, Missouri, hereinafter called party of the first part, and The Baker Company, a corporation of the City of Sedalia, Missouri, hereinafter called party of the second part, WITNESSETH:

That said party of the first part hereby promises and agrees (state what he promises and length of time for which

the contract is to run).

For and in consideration of the services agreed to be rendered to party of the second part by said party of the first part, said party of the second part agrees to pay said party of the first part the sum of (state the amount) per month, said amount to be paid on the last day of each month.

IN WITNESS WHEREOF the said parties have hereunto set their hands and seals to duplicate originals the day and year first above written.

JOHN ALLEN (L. S.)
Party of the First Part.
THE BAKER COMPANY (L. S.)
Per Richard Baker, President
Party of the Second Part.

This contract was signed, sealed and delivered in the presence of

Thomas Carter. Harry Donald

Secretary.

Attest:

ALBERT CARTER,

## § 173. Contract Between Employer and Employee.—

## A. Contract Between Dry-goods Merchant and Bookkeeper

This contract made and entered into this 1st day of January, A. D., 1913, by and between John Allen and Richard Baker, WITNESSETH:

Whereas, John Allen, a dry-goods merchant, doing business in the city of St. Louis, State of Missouri, hereinafter known as party of the first part, is desirous of securing the services of Richard Baker, a skilled bookkeeper of the City of St. Louis, Missouri, hereinafter known as party of the second part, for a period of three years.

Now, THEREFORE, IT IS UNDERSTOOD AND AGREED by and between said party of the first part and party of the

second part, as follows:

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## SAID PARTY OF THE SECOND PART PROMISES AND CONTRACTS

(1) That he will for a period of three years from the date of the making of this contract for a consideration hereinafter named, faithfully and diligently serve in the capacity of bookkeeper in the office of the dry-goods establishment of said party of the first part at 900 Washington Avenue, in the City of St. Louis, Missouri, during the business hours of said party of the first part.

(2) That he will during the said period of three years

keep true accounts for the said party of the first part.

(3) That he will, from week to week, prepare and deliver to said party of the first part a true and correct detailed statement and exhibit of the books and affairs under his charge, showing all commodities and money received and paid out.

(4) That he will keep secret the business of said party of the first part and that he will not disclose any information coming to him in the capacity of bookkeeper to any person except with the consent of said party of the first part.

For and in consideration of the faithful fulfilment of the

promises made by said party of the second part

#### SAID PARTY OF THE FIRST PART AGREES

(1) To retain said party of the second part in his employment for a period of three years from the date of making this contract.

(2) To pay said party of the second part the sum of \$100 per month, said sum to be paid on the last day of each

month.

IN WITNESS WHEREOF the parties to this contract have hereunto subscribed their names and affixed their seals to duplicate originals the day and year first aforesaid.

JOHN ALLEN. (SEAL) RICHARD BAKER. (SEAL)

Witnesses:

THOMAS CARTER. HARRY DONALD.

## B. Contract Between Merchant and Traveling Salesman

This contract made and entered into this 1st day of June, 1914, by and between John Allen, a merchant engaged in the wholesale neckwear business at room 506 Columbia Building, City of Chicago, Illinois, hereinafter called first party, and Richard Baker of the City of Chicago, Illinois, a traveling salesman, hereinafter called second party, WITNESSETH:

Said first party does hereby employ said second party to act as a traveling salesman for said first party in said neckwear business in the entire State of Missouri, for a period of one year from the date of the execution hereof, and said

second party does hereby accept said employment.

It is hereby mutually agreed that said second party will faithfully serve said first party, and that said second party will devote his entire time, attention and energies to the performance of his duties as such salesman, and that he will not either directly or indirectly be connected with, or interested in, or working for any other business or enterprise whatever during the term hereof without first obtaining the written consent of said first party.

It is hereby further agreed that said second party shall obey all reasonable orders of said first party with reference to his duties as such traveling salesman, and that said second party shall keep proper books of account and make due entries of the prices of all goods sold and of all transactions

had with reference to the said business.

For, and in consideration of the faithful performance of his duties by said second party, said first party hereby agrees to pay said second party a salary of Twenty-Five (\$25.00) Dollars per week, payable on Monday of each week, and said first party also agrees to pay unto said second party on Monday of each week all of the reasonable traveling expenses, and hotel bills incurred by said second party while in the performance of his duties for said first party for the week previous, provided that said second party shall forward to first said party on Saturday of each week an itemized statement setting forth the said expenses.

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IN WITNESS WHEREOF, the parties hereunto have affixed their hands and seals to duplicate originals the day and year first aforesaid.<sup>a</sup>

RICHARD BAKER.
JOHN ALLEN.

## § 174. Specific Contracts of Sale.—

## A. Sale of a Practice by a Physician

This contract made and entered into this 1st day of June, A. D., 1914, by and between John Allen, a Physician and Surgeon who has been practicing medicine in the City of Springfield, Illinois, for a period of 25 years, hereinafter called first party, and Richard Baker, a Physician of the City of Springfield, Illinois, hereinafter called second party, WITNESSETH:

Whereas, said first party is desirous of retiring from the practice of medicine and of removing from the City of Springfield, Illinois; and,

Whereas, he is further desirous of selling his practice as a Physician and Surgeon in said City of Springfield to said

second party; and,

Whereas, said second party is ready and desirous of purchasing said practice.

Now, therefore, it is understood and agreed by and be-

tween the said parties as follows:

Said first party does hereby sell unto said second party his practice and the good will and benefits thereof, together with all of his books, surgical instruments, office furniture and fixtures, and all drugs, medicines and bottles now used by him.

Said first party hereby agrees that he will introduce and recommend the said second party to his patients, friends and others as his successor, and that so long as said first party resides in said City of Springfield he will use his best endeavors to promote and increase the practice of said second party.

Said first party further agrees that he will not act as a

<sup>(</sup>a) Cf. Jones on Legal Forms, p. 99.

physician or surgeon either directly or indirectly by himself, or in connection with any other person for a period of ten years from the date hereof, either at said City of Springfield, Illinois, or at any place within a radius of ten miles from the court house of said City of Springfield. And said first party further agrees that in the event he should violate this provision of this contract, he will pay unto said second party by way of liquidated damages and not by way of penalty the sum of Two Thousand (\$2,000) Dollars, it being the spirit of this provision of this contract that in view of the fact that the exact amount of damages which will be sustained by said second party cannot be definitely ascertained should said first party violate this provision, therefore, the sum of Two Thousand (\$2,000) Dollars shall be taken as the sum fixed by said parties, which will be the amount of damages suffered by said second party in the event of the violation of said provision of said contract.

In consideration of the foregoing, said second party hereby pays unto said first party the sum of Five Thousand (\$5,000) Dollars cash, the receipt of which is hereby

acknowledged by said first party.

IN WITNESS WHEREOF, the parties hereunto have affixed their hands and seals to duplicate originals the day and year first aforesaid.<sup>b</sup>

JOHN ALLEN. RICHARD BAKER.

## B. Contract for the Sale of a Crop of Potatoes

This contract made and entered into this 1st day of June, A. D., 1914, by and between John Allen, a farmer, of the County of Cook and State of Illinois, hereinafter called first party, and Richard Baker, a produce merchant of the City of Chicago, Illinois, County of Cook, State of Illinois, hereinafter called second party, WITNESSETH:

Whereas, said first party is the owner of five hundred acres of land in said County of Cook, on one hundred acres

<sup>(</sup>b) Cf. Jones on Legal Forms, p. 96.

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of which said first party has already planted a crop of snow-

flake potatoes; and,

Whereas, said first party is desirous of selling said crop of potatoes when ready for market to said second party, and said second party is ready and willing to purchase said crop of potatoes.

Now, therefore, it is understood and agreed by and be-

tween said parties as follows:

Said first party does hereby sell, assign, transfer and set over all of his right, title and interest in and to said crop of potatoes mentioned in the whereas clauses of this contract to said second party, and said first party hereby agrees that as soon as said crop of potatoes are full grown and are ready for market, that he will deliver said potatoes at Warehouse No. 1 of said second party in the City of Chicago, Illinois, and not later than on the 1st day of September, 1914.

It is hereby mutually agreed by and between said parties that said second party will pay said first party the sum of One Dollar per bushel for said potatoes upon their delivery

at said Warehouse No. 1 of said second party.

It is hereby mutually agreed by and between said parties that said first party will raise at least five hundred (500) bushels of said potatoes on his said farm, and that, should he fail to do so, he will go on the open market and purchase five hundred (500) bushels of said potatoes and deliver unto said second party at not later than the 1st day of September, 1914, at Warehouse No. 1 of said second party, and said second party agrees to pay said first party the sum of one dollar per bushel for said potatoes promptly when so delivered.

IN WITNESS WHEREOF, the parties hereunto have affixed their hands and seals to duplicate originals the day and year first aforesaid.

JOHN ALLEN. RICHARD BAKER.

<sup>(</sup>c) Cf. Jones on Legal Forms, p. 111.

§ 175. Contract for the Manufacture of Merchandise. — This contract made and entered into this 4th day of January by and between John Allen, a manufacturer, of room 506 Columbia Theater Building, City of St. Louis, Missouri, hereinafter called first party, and Richard Baker, a merchant, located at Seventh and Washington Avenues, City of St. Louis, Missouri, hereinafter called second party,

#### WITNESSETH:

That for and in consideration of a sum hereinafter named said first party does hereby agree and contract to manufacture for said second party (here describe articles and amount) of the same quality and material, and value, as, and in all other respects agreeing to a sample agreed upon between the said parties and to deliver said merchandise to said second party within one month from the making of this contract.

In consideration of the prompt delivery of said merchandise by said first party to said second party in accordance with the terms of this contract, said second party does hereby agree and contract to pay to said first party the sum of (give amount).

IN WITNESS WHEREOF the parties hereunto have set their hands and seals this 4th day of January, 1910.

JOHN ALLEN (L. S.)
Party of the First Part.
RICHARD BAKER (L. S.)
Party of the Second Part.

This contract was signed, sealed and delivered in the presence of

THOMAS CARTER.
HARRY DONALD.

## § 176. Guaranty of an Account.—

June 1st, 1914.

To John Allen,

Wholesale Dry Goods Merchant, 810 Broadway,

New York City.

My Dear Sir: -

The bearer of this letter, Mr. Richard Baker, wishes to buy dry goods from you of the value of One Thousand (\$1,000) Dollars or less, the same to be paid for within 90 days from the date of this letter.

For value received, I hereby agree that if you will sell and deliver the aforesaid merchandise, or any part thereof, to said Richard Baker on credit, then, if he does not pay for such merchandise as he accepts and receives on or before 90 days from this date, then I guarantee and agree to pay for the same.

THOMAS CARTER.

## § 177. Contract to Pay a Debt Contracted During In-

fancy.—

This contract made and entered into this 1st day of June, A. D., 1914, by and between John Allen, a resident of the City of St. Louis, Missouri, said John Allen now being 22 years of age, hereinafter called first party, and Richard Baker who is now conducting and has been conducting for the past five years an automobile factory at 506 Olive Street in said City of St. Louis, said Baker hereinafter called second party, WITNESSETH:

Whereas, said first party purchased an automobile from said second party three years ago and at a time when said

first party was an infant; and,

Whereas, said first party has never paid said second party

for said automobile; and,

Whereas, said first party now having arrived at his majority is desirous of ratifying said purchase and acknowledging said debt and agreeing to pay the same.

Now, therefore, it is agreed and understood by and be-

tween said parties as follows:

Said first party hereby admits that he owes to said second party the sum of Two Thousand (\$2,000) Dollars for one Cleopatra automobile purchased by said first party from said second party and received by said first party in good condition.

Said first party hereby agrees that he will pay for said automobile said sum of Two Thousand (\$2,000) Dollars one month from the date of the execution of these presents.

Said second party hereby accepts said acknowledgment of indebtedness from said first party, and said second party hereby agrees that he will not sue or require payment of said debt until default has been made in accordance with the terms hereof, that is, until on or after July 2nd, 1914.

IN WITNESS WHEREOF, the parties hereunto have affixed their hands and seals to duplicate originals the day and year

first aforesaid.d

JOHN ALLEN. RICHARD BAKER.

## § 178. Contract Between Number of Persons to Build a Church.—

Whereas, the Trustees of the First Baptist Church and we, the undersigned members of the said First Baptist Church of the City of St. Louis, Missouri, are desirous of joining together for the erection of a new church building on lot 18, block 4000 in the City of St. Louis, Missouri.

Now, therefore, it is mutually agreed by and between all of us who subscribe our names to this contract, whether such names be subscribed simultaneously or whether they be subscribed individually at any time within thirty days from this 1st day of June, 1914, as follows, WITNESSETH:

We, the undersigned, in consideration of our mutual promises, hereby agree to and with the Trustees of said First Baptist Church and to and with each other to pay

<sup>(</sup>d) Cf. Jones on Legal Forms, p. 107.

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unto John Allen, the Treasurer of said church the respective sums set opposite our several names within a period of six months from July 1st, 1914, for the purpose of erecting said new church building:

And we, the undersigned, expressly authorize and direct the said Trustees of said church to proceed with the erection of said church on or after July 1st, 1914, and to expend such sums as are herein subscribed in the erection of said church building.

IN WITNESS WHEREOF, we have hereunto signed our names and set out the respective amounts which we sub-

scribe.e

JOHN ALLEN, RICHARD BAKER.

§ 179. Assignments.—

## A. Assignment of a Debt.

For and in consideration of the sum of (give amount) to me this day paid by Richard Baker, I, John Allen, do hereby sell, assign, transfer, and set over to said Richard Baker, his assigns, executors, and administrators, a certain debt now due and owing to me by Harry Carter of 814 Chestnut Street, City of St. Louis, Missouri, said debt amounting to the sum of (give amount) with all interest due thereon, said debt being due for (give origin and the nature of the debt). And I hereby authorize said Richard Baker for his own use but at his own cost to demand, collect, and sue for, and receive and receipt for said debt or any part thereof.

WITNESS my hand and seal this 4th day of January, A. D. 1910.

JOHN ALLEN (L. S.)

### B. Assignment for the Benefit of Creditors.

This contract made and entered into this 1st day of June, A. D., 1914, by and between John Allen, conducting a general merchandise store at 910 Olive Street in the City of St. Louis, Missouri, hereinafter called first party, and

<sup>(</sup>e) Cf. Jones on Legal Forms, p. 313.

Richard Baker of the City of St. Louis, Missouri, hereinafter called second party, and the creditors of said John Allen whose names are more particularly set out in the body of this contract, such creditors being hereinafter called third parties; WITNESSETH:

Whereas, said first party is indebted to said third parties for goods, wares and merchandise purchased of said third

parties; and,

Whereas, said first party is desirous of being relieved

from all further obligation for said debts; and,

Whereas, said third parties are willing to relieve said first party of all of his said debts provided said first party will transfer and deliver to said third parties the entire stock of merchandise which said first party has.

Now, therefore, it is understood and agreed by and be-

tween said parties as follows:

Said first party does hereby bargain, sell, transfer, assign and set over unto said second party, his heirs, executors, administrators and assigns the following described property, to-wit:

(Here set out the property)

to have and to hold the same, and every part thereof unto the said second party, his heirs, executors, administrators, and assigns forever in trust, however, for the following purposes, to-wit:

Said second party is to wind up the business of said first party with all reasonable expedition, and is to sell out all of the merchandise in the store of said first party. Said second party is to distribute the proceeds of said sale as follows:

First.— Said second party is to pay all expenses necessary and incident to the winding up of said business, including compensation to himself of five per cent of any and all amounts distributed by said second party.

Second.—Said second party is to distribute the balance of the money so received pro rata among the following persons who are all the creditors of said first party, said

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creditors to receive the said money in proportion to their respective debts:

(Here set out the names, addresses and amounts due the

several creditors.)

Third.— Should there be any surplus after the payment of the said debts, said second party is to pay such surplus to said first party, his heirs, executors, administrators and

assigns.

For and in consideration for the foregoing transfer of said property by said first party to said second party, said transfer being for the benefit of said third parties, said second party and said third parties to do for themselves jointly and severally and do in consideration of each other's mutual promises, hereby release said first party from any further obligation whatsoever for the aforesaid debts of said first party as set out in this instrument; and said second party does hereby agree to hold said first party harmless from any and all liability for the aforesaid debts.

IN WITNESS WHEREOF, the parties hereunto have affixed

their hands and seals the day and year first aforesaid.

JOHN ALLEN.
RICHARD BAKER.

(To be signed by creditors.)

## § 180. Chattel Mortgage - With Power of Sale.-

KNOW ALL MEN BY THESE PRESENTS, That John Allen of the City of St. Louis, State of Missouri, in consideration of the debt hereinafter mentioned and created, and the sum of one dollar to him paid by Robert Baker of the City of St. Louis, Missouri, the receipt of which is hereby acknowledged, does sell and convey to Robert Baker the goods and chattels now in the store at 906 Olive Street in the City of St. Louis, State of Missouri, to-wit:

(Here describe)

warranted free from incumbrances, and against any adverse claims:

UPON CONDITION, that if said John Allen pays said

Richard Baker or assigns his promissory note of this date, for the sum of One Thousand Dollars then this conveyance shall be void; otherwise it shall remain in full force and effect.

Said property may remain in the possession of said John Allen but in case of failure to pay the installments of said note as they become due respectively or in case said mortgagee or assigns should at any time deem himself insecure, said mortgagee or assigns may take possession of said property and sell the same at public auction to the highest bidder for cash, at the Court House, in the City of St. Louis and State of Missouri, having first given thirty days' public notice of the time, terms and place of sale, and property to be sold, by registered mail addressed to said John Allen and out of the proceeds pay said debt and all costs and expenses, and to pay the balance to John Allen.

At said sale said mortgagee or assigns may purchase said

property.

WITNESS our hands and seals this first day of June, 1914.

JOHN ALLEN. (SEAL) RICHARD BAKER. (SEAL)

(Then follows acknowledgment)

§ 181. Contracts With Reference to Co-partner-ships.—

A. Articles of Co-partnership

This contract made and entered into this 1st day of June, A. D., 1914, by and between John Allen, hereinafter called first party of the City of St. Louis, Missouri, and Richard Baker, hereinafter called second party, of the City of St. Louis, Missouri:

WITNESSETH: The aforesaid parties have agreed, and by these presents do agree to become co-partners under the firm name of Allen and Baker in the wholesale liquor business in the City of St. Louis, Missouri.

Said parties agree that they shall begin doing business on the 1st day of July, A. D. 1914, and they shall continue in said business as such co-partners either until their death FORMS 183

or until said partnership shall be dissolved, and with this in view said parties contribute to the capital of said firm as follows:

(Insert everything that both of said parties contribute.) Said parties agree that the aforesaid property shall be used by them in said partnership, and they also agree that during the continuance of said partnership, they, and each of them will give his and their entire time, attention and energy and the best of their power and skill in order to promote the best interests of said business, and to carry on said business successfully. Said parties hereby agree that at the expiration of each and every week, said first party shall draw from said business the sum of Fifty (\$50) Dollars and said second party the sum of Forty (\$40) Dollars.

Said parties further agree that at the end of a period of six months from the date hereof, and at the end of every period of six months thereafter following during the continuance of said partnership, they will make a true and correct inventory of all stock on hand, and will calculate the profits or losses of said business. Said parties hereby agree that whatever profits are then on hand at the expiration of said period of time, they will divide the same as follows:

(Here insert the manner of division of profits.)

And said parties further agree that in the event any losses are sustained at said times, then they will share and discharge between them said losses in the same manner and in the same proportion as they have agreed to divide the

profits as aforesaid.

Said parties further agree that neither of said parties will sell on credit any goods or merchandise belonging to said partnership against the will of said other partner, and that neither of said parties will enter into any covenant, bond, or judgment as guarantor or surety for any third person without first having obtained the written consent of the other party to this partnership.

Said parties further agree that in the event any differences or dispute arise between them concerning this contract or concerning the carrying on of said business, they will submit such differences to the determination and award of three arbitrators to be chosen by them, one of which arbitrators shall be chosen by said first party, one of which shall be chosen by said second party, and the other arbitrator to be chosen by the said two arbitrators. And said parties hereby agree that they will be bound and they will abide by the decision and award in writing of said arbitrators, or of any two of said arbitrators.

IN WITNESS WHEREOF, the parties hereunto have affixed their hands and seals this day and year first aforesaid.

JOHN ALLEN. RICHARD BAKER.

#### B. Dissolution of Partnership

This contract made and entered into this first day of September, A. D. 1914, by and between John Allen, hereinafter called first party, and Richard Baker, hereinafter called second party, both of said parties being of the City of Buffalo, New York; WITNESSETH:

Whereas, said parties have been associated together as co-partners under the firm name and style of Allen and Baker; and,

Whereas, said parties have mutually agreed to dissolve said partnership.

Now, therefore, it is understood and agreed by and be-

tween said parties as follows:

Said parties have hereby dissolved, and do by these presents dissolve the aforesaid partnership existing between them.

Said first party does hereby pay unto said second party the sum of Five Thousand Dollars (\$5,000) cash, receipt whereof is hereby acknowledged, in consideration for which said second party does hereby bargain, sell, assign, transfer and set over unto said first party all the goods, wares and merchandise in the aforesaid business of said Allen and Baker to be the property of said first party, his heirs, executors, administrators and assigns forever.

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Said second party does hereby further transfer and assign unto said first party all of the accounts receivable and bills receivable of the aforesaid business, and said first party does hereby assume all of the accounts payable and bills

payable of said firm.

It is hereby mutually agreed that said first party may continue the aforesaid business under the said firm name of Allen and Baker; it being hereby mutually agreed that the good will of said business shall be and become the property of said first party, and that the consideration of Five Thousand Dollars paid as aforesaid is an integral part of the consideration for the transfer of said good will.

IN WITNESS WHEREOF, the parties hereunto have affixed their hands and seals to duplicate originals the day and year RICHARD BAKER.

first aforesaid.

JOHN ALLEN.

§ 182. Release.—

This contract made and entered into this 1st day of June, A. D. 1914, by and between John Allen of the City of Toledo, Ohio, hereinafter called first party, and Richard Baker, of the City of Cleveland, Ohio, hereinafter called second

party.

WITNESSETH: For and in consideration of the sum of One Thousand (\$1,000) Dollars by said second party to said first party this day in hand paid, the receipt whereof is hereby acknowledged, said first party for himself, his heirs, executors, administrators and assigns, does hereby release and forever discharge said second party, his heirs, executors, administrators and assigns from any and all liability for an injury sustained by said first party on the premises of said second party at 204 South A Street in said City of Toledo, Ohio, on the 15th day of April, A. D. 1914; and said first party does hereby agree that within ten days from the signing of these presents he will acknowledge in open court satisfaction in full for the action at law which he has brought against said second party to recover damages for said injuries.

IN WITNESS WHEREOF, said parties have hereunto affixed their hands and seals the day and year first aforesaid.

JOHN ALLEN. RICHARD BAKER.

# § 183. Deeds — Proper Acknowledgment.— A. General Warranty Deed

THIS INDENTURE, Made on the first day of June, A. D. One Thousand Nine Hundred Fourteen, by and between John Allen, of the City of St. Louis, Missouri, party of the First Part, and Richard Baker of St. Louis, in the State of

Missouri, party of the Second Part.

WITNESSETH, That the said party of the First Part, in consideration of the sum of One Thousand Dollars, to him paid by the said party of the Second Part, the receipt of which is hereby acknowledged, does by these presents, GRANT, BARGAIN and SELL, CONVEY and CONFIRM, unto the said party of the Second Part, his heirs and assigns, the following described Lots, Tracts or Parcels of Land, lying, being and situated in the City of St. Louis and State of Missouri, to-wit:

## (Here describe property accurately.)

To have and to Hold the premises aforesaid, with all and singular the rights, privileges, appurtenances, immunities and improvements thereto belonging, or in any wise appertaining unto the said party of the Second Part, and unto his heirs and assigns, Forever; the said party of the First Part hereby covenanting that he will Warrant and Defend the title to the said premises unto the said party of the Second Part and unto his heirs and assigns Forever, against the claims and demands of all persons whomsoever.

IN WITNESS WHEREOF, The said party of the First Part has hereunto set his hand and seal the day and year

first above written.1

(Here follows the acknowledgment.)

(1) The Statutes of some states provide that the use of certain words in a deed, as "grant, bargain and sell" carry with them certain warranties.

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# B. Quit-Claim Deed by a Corporation

THIS INDENTURE, Made on the first day of June, A. D. One Thousand Nine Hundred Fourteen, by and between The Allen Company, a corporation of the State of Missouri, party of the First Part, and Richard Baker, of the County of Lincoln and State of Missouri, party of the Second Part; WITNESSETH:

That the said party of the First Part, in consideration of the sum of One Thousand Dollars, to it paid by the said party of the Second Part, the receipt of which is hereby acknowledged, does by these presents, REMISE, RELEASE and FOREVER QUIT-CLAIM unto the said party of the Second Part, the following described Lots, Tracts or Parcels of Land, lying, being and situated in the County of Lincoln and State of Missouri, to-wit:

(Here describe property accurately.)

To Have and to Hold, The same with all the Rights, Immunities, Privileges and Appurtenances thereto belonging, unto the said party of the Second Part, and his heirs and assigns Forever; so that neither the said party of the First Part, nor any other person or persons, for it or in its name or behalf, shall or will hereafter claim or demand any right or title to the aforesaid premises, or any part thereof, but they and every one of them shall, by these presents, be excluded and forever barred.

IN WITNESS WHEREOF, The said party of the First Part, has caused these presents to be signed by its President and its corporate seal to be hereunto affixed the day and year first above written.

THE ALLEN COMPANY,
By JOHN ALLEN,
President.

State of Missouri, City of St. Louis.—ss.

On this first day of June, 1914, before me appeared John Allen to me personally known, who being by me duly sworn, did say that he is the President of the Allen Company, a Corporation of the State of Missouri, and that the seal af-

fixed to said instrument, is the corporate seal of said Corporation, and that said instrument, was signed and sealed in behalf of said Corporation, by authority of its Board of Directors and said John Allen acknowledged said instrument to be the free act and deed of said Corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in St. Louis, the day

and year first above written.

My term expires October 15th, 1915.

ARTHUR DONALD,

Notary Public in and for St. Louis, Missouri.

§ 184. Notices to Terminate Tenancies.—

A. Notice of Landlord to Tenant to Terminate Tenancy

December 30th, 1913.

To Richard Baker:

You are now in possession of house No. 1500 East Boulevard in the City of Cleveland, Ohio, as my tenant at will. You are hereby notified to quit and deliver up to me the aforesaid premises on February 2nd, 1914, according to law in accordance with my determination to end your tenancy at will.<sup>2</sup>

JOHN ALLEN.

B. Notice of Tenant to Landlord to Terminate Tenancy

December 30th, 1913.

To John Allen: —

I hereby give you notice that I will deliver up possession of premises No. 1500 East Boulevard in the City of Cleveland, Ohio, which I now hold as tenant at will under you at the expiration of the current month, to-wit, on the second day of February, A. D. 1914.

RICHARD BAKER.

# § 185. Affidavits and Acknowledgments.—

(2) The statutes of the several states provide the length of notice necessary. Thirty days is the usual provision of the statutes. Notice must be served before the day the rent is due, and should specify the last day of the month for which the rent is paid.

## A. Affidavits

There is ordinarily no set form for an affidavit, except where affidavits are necessary for proving accounts in court, in which event the special statutes of each State must be consulted.

John Allen, being first duly sworn on his oath does say as follows:

(Here set out what John Allen says.)

JOHN ALLEN.

Subscribed and sworn to before me this 1st day of June, A. D. 1914.

My commission expires October 15th, 1915.

RICHARD BAKER,

Notary Public in and for Said City and State.

## B. Acknowledgments

The statutes of the several States require certain particulars for acknowledgment, and these particulars must be closely followed. With reference to deeds, some of the statutes require that the acknowledgment of a married woman shall be taken separate from her husband, and that the acknowledgment must so state, while other States do not make this requirement. With reference to corporations, certain forms of acknowledgment are also required by the statutes of the several States, and these statutes must be first consulted in the event of doubt.

The following forms are general in their nature:

## General Form of Acknowledgment

Given under my hand and seal this 1st day of June, A. D. 1914.

My commission expires October 15th, 1915.

RICHARD BAKER,

Notary Public in and for the State and County Aforesaid.

# Acknowledgment of Husband and Wife to Deed

State of ———, County of ——— ss.

On this 1st day of June, A. D. 1914, before me Richard Baker, a Notary Public, within and for the State and County aforesaid, appeared in person John Allen, to me personally known to be one of the parties grantor, whose name is subscribed to the foregoing instrument, and said John Allen stated that he executed the same for the consideration and purposes therein mentioned and set forth, and said John Allen acknowledged said instrument to be his free act and deed, and thereto I do hereby certify.

I, said Richard Baker, do further certify that on this said first day of June, A. D. 1914, voluntarily appeared before me Florence Allen, wife of the said John Allen, to me known to be one of the parties grantor, whose name is subscribed to the within deed, and said Florence Allen in the absence of her husband, acknowledged the said signature to be her free act and deed, and she declared that she executed the same of her own free will for the purposes therein contained and set forth without compulsion or undue influence of her said husband.

In witness whereof, I have hereunto set my hand and seal at my office, the day and year first aforesaid.

My commission expires October 15th, 1915.

RICHARD BAKER.

Notary Public in and for the County and State Aforseaid.

## Another Form for Husband and Wife

State of \_\_\_\_\_, County of \_\_\_\_\_ss.

On this 1st day of June, A. D. 1914, before me personally appeared John Allen and Florence Allen, his wife, to me

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known to be the persons described in and who executed the foregoing instruments, and they acknowledged that they executed the same as their free act and deed.

My commission expires October 15th, 1915.

RICHARD BAKER,

Notary Public in and for the County and State Aforesaid.

## **QUESTIONS**

I. Draw a contract between Allen and Baker, wherein Allen, who is engaged in the wholesale shoe business, employs Baker as the superintendent of Factory A of Allen, for a period of five years. Supply and insert all the details of this contract, showing location of the factory, hours of labor, compensation to be paid, duties to be performed, etc.

II. Draw a contract wherein Allen, a client, employs
Baker, an attorney, to bring a damage suit. Insert
all clauses to secure for Allen faithful service from
Baker, and also all clauses to secure Baker in his

compensation.

III. Draw a contract between Allen, a stock broker, and Miss Baker, a stenographer, who is also to act as cashier for Allen. Supply and insert all details.

- IV. Draw a contract between Allen, an individual, and Baker, a contractor, wherein Baker agrees to build a house for Allen. Insert all details as to location, price, terms, character of the work to be performed, etc.
- V. Allen alleged Baker struck him in the face, and thereupon injured him (Allen) to the extent of five thousand dollars. Baker denied this. Allen brought
  suit, after which Baker and Allen agreed to a compromise, wherein Allen agreed to relinquish all his
  rights for the sum of two thousand dollars, and
  Baker agreed to pay the two thousand dollars.
  Draw up a contract setting forth in full all the details of this compromise.

## REFERENCES

L. A. Jones on Legal Forms

(The Bobbs-Merrill Co., Indianapolis)

W. M. Fletcher on Corporation Forms and Precedents

(Callaghan & Co., Chicago)

J. H. Sears on Corporations

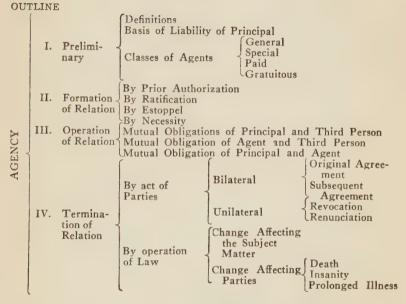
(Counselors Publishing Co., St. Louis)

M. S. Hagar and T. Alexander on Bankruptcy Forms

(Matthew Bender & Co., Albany, N. Y.)

## CHAPTER XVI

## **AGENCY**



## I. Preliminary

- § 186. Introductory
- § 187. Definitions
- § 188. Maxim on which the law of Agency rests
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## IV. Termination of the Relationship

- § 207. Methods of terminating agency
- § 208. Termination by act of the parties bilateral
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- § 210. Termination by operation of law subject-matter
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#### Forms

§ 212. General power of attorney

§ 213. Power of attorney to sell and deliver chattels

## I. Preliminary

§ 186. Introductory.— Since the beginning of time we find records which show that in every community, in matters commercial, some men have been masters and employers of others. In our own day and age, which is essentially one of great commercial activity, the gradual concentration of wealth in the hands of a few men or a few groups of men has necessarily meant a tremendous extension of the system whereby one man or one set of men furnish the capital for

a given enterprise and employ great armies of workers who manage and carry on that enterprise. Men may be employed, generally speaking, for one or both of two purposes: first, to represent their employers with the power of entering into contracts on behalf of those employers, and, second, to do purely mechanical or operative acts for those whom they serve. When an individual is acting for an employer in the first capacity he is said to be an agent; when he is acting in the second capacity he is said to be a servant.

Although the relation of principal and agent, and master and servant are both usually the outcome of a contract entered into between the superior in the relation — the principal or master — with the inferior — the agent or servant — whereby the inferior is employed to do certain work, yet the liability which results to the superior as a result of the inferior's conduct when coming into contact with third persons is essentially different in these two relationships. In agency the liability of the principal is one that involves and rests upon contractual principles and therefore the subject of agency is properly considered in this part of this book. But the liability that results to the master as a result of his servant's acts does not rest upon contractual principles and, therefore, the subject of master and servant will be discussed in a separate heading in the latter part of the book.

§ 187. Definitions.— "Agency is a legal relation, founded upon the express or implied contract of the parties, or created by law, by virtue of which one party — called the agent — is employed and authorized to represent and act for the other party — called the principal — in business dealings with third persons." An agent is a representative vested with authority, actual or apparent, to make contracts with third persons on behalf of his principal or to make promises or representations on behalf of his principal to third persons calculated to induce such third persons to change their legal relations."

§ 188. Maxim on Which the Law of Agency Rests.—

<sup>(</sup>a) Mechem on Agency, § 1.

<sup>(</sup>b) Cf. Huffcutt on Agency, § 6.

The fundamental maxim of agency is: "He who acts by or through another acts himself," i. e., the acts of an agent are the acts of the principal. This is a translation of the

Latin maxim: "Qui facit per alium facit per se."

§ 189. Purposes for Which Agency May be Created. — The relationship of agency may be created for the transaction of any lawful business. One may appoint an agent to do any lawful act except such an act as, from its inherent nature or from restrictions imposed by the law governing it, must be done in person. An example of a contract which from its inherent nature must be entered into in person is that of marriage. Examples of acts which because of restrictions imposed by law must be done in person are all discretionary acts connected with public offices, such as acting as judge of a court.

§ 190. Who May be a Principal; An Agent.— Any person capable of making an enforceable contract may be a principal. Any person, except an insane person, or a very young child, may be an agent. From these last two sentences it is seen that one who has not yet reached his majority, except if he be an extremely young child, may act as an agent, and his acts will be binding on his principal.

- § 191. Agents Classified.— Agents may be classified as general and special. A general agent is (1) one authorized to transact all the acts pertaining to a certain kind of business of his principal or all business at a certain place or all acts of a particular class or series, or (2) one whose business or profession it is to represent any or all persons who may choose to employ him, such as an attorney-at-law, a broker, or a factor.<sup>1</sup>
- (1) "An attorney-at-law is one whose profession it is to give advice and assistance in legal matters and to prosecute and defend in the courts the causes of those who may employ him for that purpose."

"A broker is one whose business it is to bring parties together to bargain, or to bargain for them, in matters of trade, commerce, or navigation."

"A factor is one whose business it is to receive and sell goods for commission. He is often called a commission merchant. If he guarantees payment for the goods he sells he is said to act under a del credere commission

"The difference between a general and special agent is not absolute but relative. It is a difference in degree and not in kind. In either case the principal, by authorizing the agent to do a particular act or class of acts, vests him ostensibly 2 with authority to do what is ordinarily incidental to the execution of the power. In either case the burden of proof 3 is on the person dealing with the agent to show that the agent had the authority, real or ostensible, which he assumed to exercise. In bearing this burden the proponent may proceed more easily in the case of an agent whose incidental powers are naturally or necessarily extensive than in the case of one whose incidental powers are naturally or necessarily limited." o

§ 192. Elements of Authority of Agents.— So far as the relation between the principal and the agent is concerned an agent has (1) the powers which the principal specially confers upon him, (2) the powers necessarily or reasonably incidental to those actually conferred, (3) the powers annexed by custom or usage to those conferred. It must be noted, however, that if the principal chooses he may limit or entirely do away with both the powers ordinarily incidental to the agency and with the powers annexed by custom, and the agent is bound by such limitations imposed by his principal. But so far as third persons are concerned, they must have actual notice of the curtailments of the agent's incidental or customary powers to be bound thereby. And

[and he is called a del credere agent]."—Mechem on Outlines of Agency, §§ 20-22-23.

- (2) "The authority of an agent is the aggregate of powers which, in contemplation of law, the principal has conferred upon the agent."—Mechem on Agency, § 138. The term "ostensible" or "apparent authority" is used in contradistinction to the term "actual" or "real." The actual or real authority of an agent is that authority which the principal has as a matter of fact conferred upon the agent. The ostensible or apparent authority is that authority which the principal, by his words or conduct, leads third persons to believe the agent possesses.
- (3) "The burden of proof is the duty of proving the facts in dispute on an issue raised between the parties in the case."—Bouvier's Law Dictionary: Burden of Proof.
  - (c) Huffcutt on Agency, § 104.

if third persons do not have such notice they have the legal right to presume that the agent possesses the ordinary inci-

dental and customary powers.

Third persons may also rely upon the representations, by words or conduct, made by the principal to them as to the authority of his agent, notwithstanding that as a matter of fact such principal may not actually have conferred such authority and that such authority was neither incidental nor customary. This is based on the theory of estoppel; that is, that the law will not permit a man to hold another out as possessing certain authority and then, after the third person has acted, allow the party making the representation to deny that which he previously asserted. As is said by Professor F. R. Mechem in his excellent treatise on the Law of Agency (§ 57, Second Edition), "The distinction which leads to the division of agencies into actual and ostensible is one which is deeply rooted in the law of agency. In the nature of the \* \* \* the law must often, for the protection of the third persons, proceed upon the appearance of authority created by the alleged principal without stopping to determine critically whether the appearance corresponded in all respects with the fact. The formal distinction was made in the proposed code of New York and has been adopted in California and other of the western States. As there stated, the agency is actual when the agent has really been employed and authorized by the principal; the agency is ostensible when the principal intentionally or by want of ordinary care, leads a third person to believe another to be his agent who has not really been employed and authorized by him."

## **EXAMPLES:**

- 1. Allen was employed by Baker to travel and sell merchandise to farmers. Nothing was said by either party at the time of making the arrangements of the manner in which Allen was to travel from farmhouse to farmhouse. In such a case Allen would have incidental power to hire a suitable conveyance to carry him from house to house.
  - 2. Allen employed Baker, an attorney-at-law, to represent him in

a case. Baker would have all the customary power ordinarily possessed by attorneys.

3. Allen employed Baker to act as his agent in selling a certain lot of pianos, with the specific agreement that Baker had no authority to do anything but sell the pianos in question. One Carter met Allen and told him that he had a piano which he would sell for \$100. Allen replied, "Show it to my man Baker and if he is satisfied with its condition, you may deliver it to him for me." Baker examined the piano, found it in good condition and took it away from Carter's house. In the interim, Allen had changed his mind about purchasing Carter's piano, but he had not communicated his changed intention to Carter. After Baker purchased the piano from Carter, Allen refused to take it on the grounds that Baker had the authority only to sell and not to buy pianos for him. Such an excuse would not be available to Allen, inasmuch as he had represented to Carter that Baker had full authority to act in the particular purchase in question.

#### II. Formation of the Relation

§ 193. The Four Methods of Creating the Relation of Principal and Agent.— The relation of principal and agent may be created in four ways: (1) by prior authorization, (2) by ratification, (3) by estoppel, and (4) by necessity.

§ 194. Agency by Prior Authorization.— The usual method of creating the relation of agency is by an enforceable contract between the principal and the agent. It is well to have a contract of agency in writing and have the instrument signed by the parties to be bound thereby. But a verbal contract of agency is binding except in the following cases: (1) where the contract of agency in accordance with its terms can not be performed within one year from the time of making thereof; (2) where the Statute of Frauds of the State require that the agent's authority be in writing provided he executes written instruments; (3) where the contract between the principal and the third person is required to be under seal, the agent's authority must be under seal. Such authority under seal is called a power of attorney.

It must now be noted that a person may agree to become an agent for another without any compensation. Such a person is called a gratuitous agent. His acts are as binding on the principal as those of a paid agent. The only difference between a gratuitous agency and a paid agency is that if the gratuitous agent refuses to act for the principal no legal redress can be had against him by the principal, inasmuch as his promise was not based upon a valid consideration.

#### **EXAMPLES:**

- 1. Allen made a contract with Baker whereby Baker agreed to represent Allen in all transactions regarding Baker's department store, for the sum of \$5,000 per year. This was an agency by prior authorization.
- 2. Allen and Baker were good friends. As a favor to Baker, Allen consented to make a contract with Carter for and in the name of Baker. Allen was to receive no compensation for his services. Allen was a gratuitous agent. If he had so chosen, he could have refused to make the contract for Baker. But if he made the contract, then both Carter and Baker would be bound thereby.
- §195. Agency by Ratification.— Ratification in agency is the assent to adopt all the results of an act done in one's name or on one's behalf either by a person who had no prior authority to represent one at all or by a person who, having had a limited prior authority, exceeded it. The essential elements of ratification are as follows: (1) the act must have been done by one who proposed to act as an agent for a certain principal; (2) the principal must have been an existing, competent person at the time of the doing of the act; (3) the act must have been a legal one; (4) the principal must give his real assent to be bound unconditionally, after he has received or, after he has been in a position to receive complete information in regard to the entire transaction.

If a valid ratification takes place, then it is just as if a prior authorization had been given to do the act. This rule is succinctly and well stated in the Latin maxim, "Omnis ratihabitia retrotrahitur et mandato priori æquiparatur"— every ratification has a retrospective effect and is equivalent to a prior command.

#### **EXAMPLE:**

Carter offered to sell Allen 400 Cleopatra pianos at \$100 per piano. Allen well knew that these pianos were worth \$200, but, inasmuch as he did not have any money, he could not buy the pianos for himself. He, therefore, determined to make the contract of purchase in the name of and on behalf of his friend, Baker. Baker had given Allen no prior authority to make such a contract on his behalf, but notwithstanding this Allen did so. When Baker heard of the contract that Allen had made on his behalf he was entirely satisfied with what Allen had done and he notified Carter that he ratified Allen's act. The contract of purchase became just as valid then as if Baker had given Allen prior authority. If, however, Baker had refused to ratify Allen's contract then he (Baker) could not have been held liable for his refusal. After Baker ratified the contract he could not later withdraw his ratification without the consent of Carter. Cf. Whiting v. Mass., 129 Mass. 240.

§ 196. Agency by Estoppel.—Estoppel is that bar or impediment which the law raises to prevent a man from proving that a fact is contrary to what he previously represented it to be. As applied to the law of agency "it may, therefore, be stated as a general rule that whenever a person has held out another as his agent, authorized to act for him in a given capacity; or has knowingly and without dissent permitted such other to act as his agent in that capacity; or where his habit and course of dealing have been such as reasonably to warrant the presumption that such other was his agent authorized to act in that capacity, whether it be in a single transaction or in a series of transactions, his authority to such other to so act for him in that capacity will be conclusively presumed, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence; and he will not be permitted to deny that such other was his agent authorized to do the act he assumed to do, provided that such act was within the real or apparent scope of the presumed authority." d By this it will be seen that the law

<sup>(</sup>d) Mechem on Outlines of Agency, § 68.

of estoppel is merely an application of the rule of good morals.

#### EXAMPLE:

Allen represented that Carter was his lawful general agent and had full power to conduct and manage a certain business. Baker to whom these representations were made believed them, and, after some negotiations, he made a contract with Carter, who was presumably acting for Allen. Allen being dissatisfied with the contract refused to be bound thereby and gave as his defense that he had never employed Carter as his agent. Allen would not be allowed to plead such a defense, for the doctrine of estoppel would apply. The law would prevent Allen from proving that the facts were contrary to what he represented them to be.

§ 197. Agency by Necessity.— It may be stated as a general rule that the relationship of agency can exist only by the express or implied assent of the principal, either previously given or subsequently conferred. In a few cases, however, authority to act as agents for certain purposes arises by operation of law, as an incident of some other relation in which the parties already stand. Of these classes of cases there are three chief types: (1) the authority of the wife to buy necessaries on her husband's credit; (2) the authority of a shipmaster to buy necessaries on the owner's credit, and also in extreme cases to sell the cargo and the vessel; (3) the authority of an unpaid vendor of goods to sell the goods, after holding them a reasonable length of time, and to charge the vendee with the difference between the contract price and the amount received from the resale, provided the amount received is less than the contract price.

The relationship created in the three classes of cases mentioned in the preceding paragraph is called agency by necessity because the law creates the agency on the grounds that the dire necessity existing in this class of cases requires

immediate action.

## EXAMPLES:

I. Mrs. Allen had been deserted by her husband through no fault of hers. He had not supplied her with necessaries and, moreover, he had published a notice saying that he would not pay for her purchases. Mrs. Allen applied to a tradesman to sell her some groceries and household supplies, which she absolutely had to have to maintain life, on her husband's credit. The tradesman supplied the goods and he then demanded payment of Mr. Allen who refused to pay the bills. In such a case Mr. Allen would have to pay, for, in the eyes of the law, Mr. Allen was responsible for his wife's necessaries and legally she was acting as his agent when she purchased the goods.

2. A ship was caught in a storm on the Atlantic and was driven for days before the tempest. Finally the ship reached a harbor in safety. But it had carried only a small supply of provisions and the commander decided to purchase supplies on the credit of the owner of the ship, so that should any further mishap occur there would be no danger of starvation. This, he could lawfully do, as an agency by necessity exists in the case of commanders of ships.

3. Allen sold twenty barrels of apples to Baker at \$5 per barrel. Baker paid Allen \$20 on account and it was agreed that Allen was to retain possession of the goods until Baker paid the balance, which he agreed to do on the following day. Baker did not pay for the apples on the following day and, after holding them for several days, Allen decided to resell them to Carter. This he did, receiving \$4 per barrel for them. He could then legally obtain a judgment against Baker for the \$20—the difference between the price agreed upon between Allen and Baker and that which Carter agreed to pay. Dustan v. McAndrew, 44 N. Y. 72.

# III. Operation of the Relationship of Agency

§ 198. What the Study of Operation Includes.— The operation of the relationship of agency includes a study of the mutual rights and obligations of principal and third persons, of agents and third persons, and of principals and agents.

# (1) Mutual Obligations of Principal and Third Persons

§ 199. Principals Classified.— Before discussing the mutual obligations of principals and third persons it may be noted that principals are of two kinds — disclosed and undisclosed. If an agent in making a contract advises the third

persons that he is acting for a principal, then such principal is said to be disclosed, notwithstanding the principal's name may not have been mentioned. Where the principal's name is given he is a "named" principal; where his name is not given he is an "unnamed" principal, provided the third person knows the agent is not acting for himself. If, however, the agent makes the contract in his own name and apparently on his own behalf when, in fact, he is acting for some principal, then such principal is said to be undisclosed.

§ 200. Disclosed Principal and Third Persons.— The general rule is that a disclosed principal is liable on all lawful contracts made by his agent with third persons, if the agent was acting within actual or apparent scope of his authority, or if the principal has ratified the agent's act. Otherwise stated, the rule is that a disclosed principal is not liable on contracts of his agent made without the bounds of the actual or apparent scope of the agent's authority and not ratified by the principal. Although the disclosed principal has liabilities, he also has rights of a corresponding nature. He may enforce against third persons all lawful contracts made with them in his name and by his agent.

## **EXAMPLES:**

- 1. Allen gave Baker authority to sell goods for him. Allen notified Carter that Baker was his agent. Baker made a contract with Carter to sell Carter a quantity of goods far below their actual value. Carter now seeks to escape liability on this contract. He cannot do so, inasmuch as Baker was acting within the apparent scope of his authority.
- 2. Allen gave Baker a horse and instructed him to sell it for cash. Baker met Carter, a friend, and told him that he was acting as an agent for Allen to sell a horse. Carter looked at the horse and then offered to trade the horse which he had for the one Baker was trying to sell. Baker made the trade. Allen refused to be bound by the transaction. He may legally recover his own horse, for Baker had authority only to sell Allen's horse and not to trade, and this Carter should have known from Baker's statement to him that he had been instructed to sell the horse. If Carter was in doubt as to the au-

thority vested in Baker it was his (Carter's) duty to make due inquiry of Allen. Cf. Johnson v. Hurley, 115 Mo. 513.

§ 201. Undisclosed Principal and Third Persons.—Subject to a few exceptions, *undisclosed* principals have the same rights and liabilities as disclosed principals. These exceptions may be stated as follows:

(1) If the contract made by the agent and in the agent's name with the third person is under seal, then the principal is not liable to the third person and vice versa the third person is not liable to the principal. In such a case the con-

tract is between the agent and the third person.

(2) If an agent signs his own name to a negotiable instrument (a promissory note, a bill of exchange, or a check) as maker, or drawer, or endorser, his principal is not liable to the third person on such instrument, nor is the third person liable to the principal. So far as the instrument is concerned, it is between the agent and the third person, and they alone have rights and liabilities thereunder.

(3) If the contract is one involving the performance of certain work by the agent clearly showing that the third person was relying on the personal skill of the agent or involving the element of personal trust and confidence in the agent, then the principal cannot thrust himself upon the third person.

(4) If the existence of any other principal has been expressly denied in a written contract entered into between the agent and the third person, then the contract will stand

as made.

(5) If before the principal is disclosed the third person fully performs his contract then the principal cannot require the third person to perform the contract a second time; so if the agent performs the third person cannot hold the principal again.

(6) If after discovery that he has been dealing with an undisclosed principal the third person elects to hold the agent

alone, he cannot later proceed against the principal.

§ 202. Liability for Innocent and Fraudulent Misrepre-

sentations.— A disclosed or undisclosed principal must answer for both the innocent and fraudulent misrepresentations of his agent, if made within the actual or apparent scope of the agent's authority, in the same way as if the misrepresentations had been made by the principal in person. Likewise the third person must answer to the principal for all misrepresentations to the agent just as if the misrepre-

sentations had been made to the principal in person.

§ 203. Notice to Agents,— In discussing the mutual obligations of principals and third persons a word must be said in regard to notice to agents. If an agent receives notice of any fact in the course of a given transaction in regard to that transaction, it will be presumed that the principal had such notice notwithstanding that the agent may have failed to communicate to his principal what he learned. But if an agent receives notice of some fact before his agency begins then such notice will not be considered notice to the principal unless it can be shown that the facts under ordinary circumstances ought to have been present in the agent's mind at the time of the transaction and that the agent was at liberty to disclose the facts to his principal.

# (2) Mutual Obligations of Agents and Third Persons

§ 204. Rules.— An agent is not liable to a third person on a contract made by the agent if the agent has acted within the apparent scope of his authority and for a disclosed principal. Likewise in such cases the third person is not liable to the agent. In this case the contract is strictly between the principal and the third person. But if an agent exceeds the actual and apparent scope of his authority he may be held liable to the third person for his breach of his warrant of authority, although he is not liable on the contract made in the principal's name. An agent, who contracts in his own name with a third person and who does not disclose that he is acting for an unnamed or undisclosed principal is personally liable on contracts which he makes. And he likewise may hold the third person to the contract. If, however, the principal steps in and assumes liability on the contract and

the third person is willing that the agent should drop out, then the agent has no further rights or liabilities on the contract. If an agent is guilty of fraudulent misrepresentations he may be personally held liable in tort to the third person for such representations.

# (3) Mutual Obligations of Principal and Agent

§ 205. Duties of Principal to Agent.— A principal owes three duties to his agent:

(1) To compensate him in accordance with the terms of their contract, or, if no contract was made, then to pay

him a reasonable compensation for his services.

(2) To reimburse him for his advances and expenses properly and reasonably incurred for and on behalf of his

principal.

(3) To repay to him any damages which he was compelled to pay because of his doing an act, at the direction of the principal, which act was not manifestly illegal or known by the agent to be illegal. Such repayment is called indemnity.

§206. Duties of Agent to Principal.—An agent owes

six duties to his principal:

(1) He must obediently carry out the directions of his principal, so long as those directions do not ask him mani-

festly to violate the law.

(2) He must use the utmost good faith toward his principal. An agent must be careful not to place himself so that his own interest will come into conflict with those of his principal.

(3) He must possess and exercise the skill and diligence

which he represents himself as possessing.

(4) He must keep and render faithful and accurate accounts of all property coming to him in the course of his agency. He must keep the funds of his principal separate from his own.

(5) He must give timely notice to his principal of all facts coming to his knowledge, a reasonable time before, or any time during the course of the agency, which relate to

the subject-matter of the agency, if such facts are necessary

for the principal to know to safeguard his interests.

(6) He must act in person. He cannot delegate the performance of any duty requiring discretion to another person unless his principal has expressly or impliedly authorized him to do so. He may delegate the performance of purely mechanical acts.

## IV. Termination of the Relation

§ 207. Methods of Terminating Agency.— An agency may be terminated either (1) by act of the parties, or (2) by operation of the law. The act of the parties may be either (1) bilateral, i. e., the act of both parties, or (2) unilateral, i. e., the act of one party. The termination by operation of law may be due either (1) to a change affecting the subject-matter of the agency, or (2) to a change affecting

the parties to the relation.

§ 208. Termination by Act of the Parties; Bilateral.—The termination of the agency by the bilateral act of the parties is the normal method. Sometimes the parties agree at the time of entering into the relationship of principal and agent that the agency is to be terminated at a certain time. It also often happens that after the parties enter into the relationship of agency they agree that it will be to their mutual advantage to drop the matter and thus they terminate the agency, but the most usual method of termination by the bilateral act of the parties is through performance. Once the purpose for which the agency was created is fulfilled, the relationship of agency comes to a close.

§ 209. Termination by Act of the Parties; Unilateral. — The termination of the relationship of agency by the unilateral act of the parties takes place either through the act of the principal in discharging the agent or through the act of the agent in renouncing his agency, i. e., in leaving the employment of the principal. In all except one class of cases the principal has the power, although not always the legal right, to discharge an agent whenever he sees fit. If, however, the principal exercises this power wrongfully

he must answer in damages to his agent. An agent also has the power, although not always the legal right, to quit his employment whenever he sees fit, but he must answer in damages to his principal if he leaves the employment without legal justification.

The one class of cases in which an agency cannot be terminated by the sole act of the principal in discharging the agent is that class in which the authority of the agency is coupled with an interest. Authority coupled with an interest exists in those cases wherein the agent has some proprietary interest or estate of his own in the subject-matter of the agency itself, as distinguished from an interest in the compensation he is to receive for his services. This interest must be of such a character that its continuance is necessary to protect the agent's rights. In such cases it would be unethical to give the principal power to terminate the agency at his own will, and on these grounds the law has made it also illegal.

## **EXAMPLES:**

- 1. Allen borrowed \$100 from Baker and gave Baker as security for the debt a horse and buggy, with the express understanding that if the debt was not paid within six months, Baker might sell the property in his own name, take out the \$100 and return the balance of the money received to Allen. In this case Baker had a proprietary interest in the subject-matter of the agency apart from any question of compensation for his services in selling the horse and buggy. This authority, therefore, is coupled with an interest and Allen could not revoke the agency at his own will.
- 2. Allen employed Baker as his agent to sell a piano, with the understanding that Baker was to take his fee for selling the piano out of the proceeds of the sale. The next day Allen decided not to sell the piano and he, therefore, revoked the agency. This he had power to do, for Baker had not yet sold the piano and had no proprietary interest in the article apart from the compensation he was to receive. Cf. Hunt v. Rousmanier, 8 Wheat. (U. S.) 174.
- § 210. Termination by Operation of Law; Subject-Matter.— If, for example, the subject-matter of the agency is destroyed the agency is terminated by operation of law.

But if the destruction of the sub-matter is due to the fault

of the agent, he is liable to his principal for the loss.

§ 211. Termination by Operation of Law; Parties.—An agency may be terminated by operation of law due to a change affecting the parties to the agency. If, for example, either the principal or the agent dies, or becomes insane, the agency is terminated by operation of law unless it is an agency coupled with an interest. So also a prolonged illness of the agent may make it impossible for him to perform his part of the contract and the agency will, therefore, be terminated. Not so, however, the illness of the principal, which ordinarily does not terminate the agency.

#### **FORMS**

§ 212. General Power of Attorney.—

KNOW ALL MEN BY THESE PRESENTS, That I, Thomas Allen, of St. Louis, Missouri, have made, constituted, and appointed, and by these presents do make, constitute, and appoint John Baker, of Kansas City, Missouri, my true and lawful attorney,<sup>4</sup> for me and in my name and stead to (here describe what is to be done) giving and granting unto my said attorney full power and authority to do and perform every and all acts whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes, as I might or could do if personally present, hereby authorizing and confirming all that my said attorney shall lawfully do or cause to be done by virtue hereof.

IN WITNESS WHEREOF I have hereunto set my hand and

seal this 1st day of January, A. D. 1910.

THOMAS ALLEN. (SEAL)

(Here follows the statutory acknowledgment of the particular State in which the instrument is signed.)

(4) By the word "attorney" as used in the foregoing form is not meant attorney-at-law but has reference to the creation of a so-called attorney in fact. Any person not laboring under legal disabilities may be appointed an attorney in fact. No special form is necessary for such an appointment except where by statute it is provided that it must be acknowledged and recorded, and in some states that it must be under seal.

AGENCY 211

§ 213. Power of Attorney to Sell and Deliver Chattels.—

KNOW ALL MEN BY THESE PRESENTS, That I, the undersigned, of Chicago, Illinois, do hereby constitute and appoint John Baker of St. Louis, Missouri, to be my true and lawful attorney for me and in my name and behalf to sell, transfer, and deliver unto any person or persons (here describe the articles to be sold) and to receive payment for such merchandise and to receipt therefor.

IN WITNESS WHEREOF I have hereunto set my hand and

seal this 1st day of January, A. D. 1910.

JOHN ALLEN. (SEAL)

(Then the statutory acknowledgment is appended.)

## **QUESTIONS**

I. Define the following terms: agency, principal, agent, general agent, special agent, attorney-at-law, broker, factor, del credere agent.

II. Give the meaning of the following maxims: "Qui facit per alium facit per se" and "Omnis ratihabitio retrotrahitur et mandata priori æqui-

paratur."

III. Allen, a merchant, employed Baker, an eighteenyear-old boy, to act as his general agent in a
certain business. Baker made a contract with
Carter on behalf of Allen. Inasmuch as the
contract was not a very satisfactory one Allen
wished to escape responsibility thereon. He,
therefore, notified Carter that he would not
stand by the terms of the contract and he gave
as his excuse the fact that Baker was an infant.
Decide the case, giving reasons.

IV. Allen was declared to be insane and a guardian was appointed for him by a court having jurisdiction over such cases. A few weeks later Allen appointed Baker to act as his general agent in a certain matter. On behalf of Allen,

Baker made a contract with Carter. Could Carter escape responsibility on this contract, and if not, why not?

What are the four methods of creating the rela-

tion of principal and agent?

Allen asked Baker, a friend, to act as his agent VI. for him in selling a certain horse. Baker was to receive no compensation for his services. Baker sold the horse to Carter and gave him a bill of sale therefor in the name of Allen. Allen, not being satisfied with the price which Baker agreed to pay, declared he was not bound by Baker's act, inasmuch as Baker was to receive no compensation for his service. What

do you think of Allen's contention?

Allen, professing to act as an agent for Carter, VII. made a verbal contract with Baker on Carter's behalf. As a matter of fact, Allen had no authority whatever to act for Carter. Hearing of the contract which Allen had made presumably on behalf of Carter, and knowing that Allen had had no authority to make such a contract, one Donald came forward and ratified the contract. Baker refused to be bound by Donald's ratification. Donald sued Baker on the contract. Decide the case, giving reasons.

VIII. Allen testified in open court in a certain law suit that Baker had been and was his duly authorized general agent to conduct his (Allen's) business at 412 Market Street, Chicago, Illinois. Carter heard the testimony. A few days later Carter met Baker and offered to sell him a certain lot of merchandise for Allen's store. Baker made the contract of purchase. When Allen heard of it he refused to be bound on the grounds that Baker had never been and was not his agent for any purpose. Carter sued Allen on the contract. Decide the case, giving reasons.

IX. Give an illustration of agency by necessity.

X. What are the mutual obligations of principals and third persons?

XI. What are the duties of the principal to his agent?

of an agent to his principal?

XII. Can an undisclosed principal be held on contracts

made by his agent?

XIII. Allen represented that he had been asked by Baker to act for him in a certain transaction. Relying on the representations of Allen, Carter made a contract with him in regard to the matter. It later developed that Allen had never been asked to act for Baker. Can Carter hold Baker on the contract? Can Carter recover damages from Allen and, if so, for what?

XIV. Is the principal liable for the innocent or fraudu-

lent representations of his agent?

XV. Allen tried to sell Baker 40 Cleopatra pianos at \$100 per piano. Baker examined the pianos and found them in good condition. Inasmuch as Baker thought he might buy the pianos for less money if he had his purchasing agent, Carter, deal with Allen, he (Baker) notified Allen that Carter would represent him in the matter. About two days later, owing to a heavy rain, the pianos were badly damaged. Allen showed the pianos, in their damaged condition, to Carter and he (Allen) notified Carter that he would sell the pianos for \$80 a piece in view of the fact that they had been damaged. Carter accepted the offer on behalf of Baker and made the contract of purchase. When Baker, later, saw the pianos he refused to have them at any price. Allen sued Baker on the contract and Baker set up as a defense that he did not know

the pianos were damaged. Decide the case,

giving reasons.

XVI. Give an original illustration of the method of terminating an agency by the sole act of one of the parties.

Give an original illustration of an agency coupled XVII.

with an interest.

XVIII. Allen made a contract to employ Baker as his agent for a period of one year. After three months of service Baker requested Allen to release him from his contract of agency and Allen agreed to do so provided that Baker would pay him the sum of \$50, which Baker did. Later Allen was sorry that he had released Baker from his contract and he, therefore, sued him for breach of contract. Decide the case, giving reasons.

Allen and Baker made a contract in which it was XIX. agreed that Baker was to represent Allen in the sale of a certain house and that Baker was to receive \$400 for his services. The next day after the contract was made and before Baker had done anything, the house was destroyed by a hurricane. Baker demanded that Allen pay him the \$400. Allen refused, whereupon

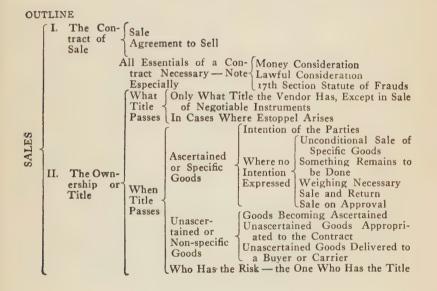
Baker sued. Decide the case.

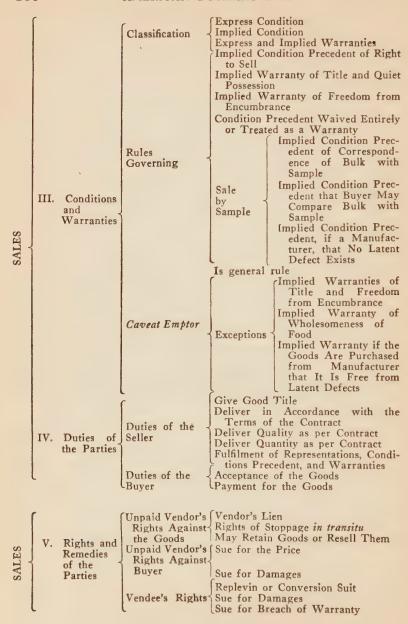
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2 Corpus Juris 404.

# CHAPTER XVII SALES





## (1) The Contract of Sale

## § 214. Definitions and their explanation

## (2) The Ownership or Title

- § 215. Title defined
- § 216. What title passes
- § 217. When title passes
- § 218. Who has the risk

## (3) Conditions and Warranties

- § 219. Definitions and classification
- § 220. Rules governing conditions and warranties
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## (4) Duties of the Parties

- § 222. Duties of the seller
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## (5) Rights and Remedies of the Parties

- § 224. Unpaid vendor's rights against the goods
- § 225. Unpaid vendor's rights against the buyer for breach of contract
- § 226. Vendee's rights

## (6) Forms

- § 227. Bill of sale with warranty
- § 228. Statement of an auctioneer after sale
- § 229. Statement of a purchaser at an auction sale

## I. The Contract of Sale

§ 214. Definitions and Their Explanations.— A sale is the transfer of the ownership in goods for a price in money. Ownership has been defined as the right by which a thing belongs to one individual to the exclusion of all other persons. By goods is meant commodities or merchandise, i. e., all personal property except money. An agreement to sell is a contract whereby the ownership of goods is to be transferred at some future time.

#### **EXAMPLES:**

1. Allen wrote to Baker, "I offer you my Cleopatra piano for \$400." Baker replied, "I accept your offer." This was a sale.

2. Allen wrote to Baker, "Six months from date I will sell you my Cleopatra piano for \$400." Baker replied, "I accept your offer." This was an agreement to sell.

A contract of sale is a contract whereby one party, called the sellor or vendor, transfers or agrees to transfer the ownership in goods to another party, called the buyer or vendee, for a money consideration called a price. A careful reading of this definition will show that a contract of sale includes both the sale and an agreement to sell. In the sale the transfer of the ownership in goods takes place immediately, while in an agreement to sell the transfer has to take place in the future. A sale is often called an executed contract, while an agreement to sell is called an executory contract.

Inasmuch as both the sale and the agreement to sell are contracts that are necessarily covered by contract law, an enforceable contract of sale must contain all the essentials necessary to every enforceable contract. Special attention must be called to the following facts:

(1) The consideration in a contract of sale is money.

(2) The lawful thing to be done in a sale is to transfer ownership in goods. The seller must therefore necessarily own the goods before he can transfer such ownership.

(3) The 17th section of the Statute of Frauds, previ-

ously considered, applies to the law of sales.

# II. The Ownership or Title

§ 215. Title Defined.— Technically speaking, the word "title" is not properly applied to personal property; but when so applied it has been defined to be the means whereby the owner of personal property has just possession of it.<sup>a</sup> Title is that which gives a right or claim to ownership; that by which the owner of lands or of personal property has the just possession of his property; the instrument or document by which a right to something is proved.<sup>b</sup>

<sup>(</sup>a) 28 Am. & Eng. Enc. § 232.

<sup>(</sup>b) Pratt v. Fountain, 73 Ga. 261.

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§ 216. What Title Passes.— The general rule is that the seller can give no better title to property than he himself possesses. A thief has no title to stolen property and therefore he can convey none, and no matter how often such property changes hands and no matter how innocent the purchaser may be of any wrongdoing, the one from whom the property has been stolen may nevertheless recover it if he can clearly identify it. A buyer should, therefore, be on his guard and should ascertain if the person from whom he purchases property has come by it honestly and possesses a valid title thereto.

#### EXAMPLE:

Allen stole a dog from Baker and sold it to Carter who knew nothing of the theft. Carter later sold the dog to Donald, who was also an innocent purchaser for value.¹ On learning that Donald had possession of the dog, Allen immediately demanded its return and upon Donald's refusal to surrender it, Allen brought suit. He could recover the dog inasmuch as he had the title to it and he had never transferred that title to anyone else.°

To the general rule that one can give no better title to property than he himself possesses, there are two chief exceptions:

- (1) In the sale of negotiable instruments the seller may sometimes give a better title than he himself possesses. The reason for this exception is that negotiable instruments have been clothed with the character of money and it is for the best interest of the community that such paper should circulate freely. There also is considered the fact that the maker or signers of the instrument have either directly or indirectly made it possible that an innocent purchaser be endangered, hence the rule is that of two innocent persons,
- (1) An innocent purchaser for value is one who purchases for a valuable consideration and without notice of any defect in the vendor's title or without notice of any facts which should arouse his suspicion and put him upon inquiry.

(c) Cf. Robinson v. Skipworth, 23 Ind. 311.

the one putting the instrumentality into existence should bear the burden.

- (2) If the true owner of goods vests another with the indicia (i. e., signs or indications) of ownership to such goods, and the latter party sells the goods to an innocent purchaser for value, such person gets a valid title to the goods. And so also where the true owner of goods by his words or conduct induces a prospective buyer to believe that a second party and not himself has the valid title to the goods, and such prospective buyer on the strength of the true owner's representations, buys the goods from the second party, the true owner will be stopped from setting up his title as against that of the innocent purchaser for value. For example, if Allen should sell goods to Baker and Baker permitted Allen to retain possession of the goods and also to have written evidence of the title of the goods and later Allen should resell the goods to Carter, then, by the weight of authority, Carter would get a good title to the goods. The reason underlying this exception is that since Baker, by his own act, has permitted Allen to retain possession of the goods and the indicia of ownership, and he (Baker) has thus, by his conduct, permitted innocent third persons to believe that Allen possessed the legal title to the goods, it would be poor policy to allow Baker to escape the consequence of the wrongdoing that he had made possible.
- § 217. When Title Passes.— One of the most important questions in the law of sales is: At what moment does the title pass from the seller to the buyer? It is upon the determination of this question that the decision rests upon whom the risk of loss or destruction of the property is to fall in all cases, except where the parties have definitely specified upon whom the risk is to rest. It is also upon the settlement of the question whether or not the title has passed that the rights of creditors or of subsequent purchasers from one of the parties must rest. And also upon this question rests the determination of what form of action the seller shall pursue in case the buyer refuses to accept the goods. If the title has already passed, the seller sues for the price

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of the goods, but if the title has not passed the seller may sue for breach of the contract of sale and purchase.

In determining the question as to when the title has passed, it is necessary to classify goods into two groups: (1) specific or ascertained goods, i. e., goods actually designated, specifically indicated, determined, or made certain; (2) non-specific or unascertained goods, i. e., goods described by the parties but not actually designated or fixed upon.

The following rules, I and II with respective sub-headings, will act as a guide to indicate the time when the title passes. For the text of these rules we have very freely used Benjamin's Principles of Sales, making certain changes in the arrangement, wording and numbering. The ex-

amples, however, are the author's:

Î. Where there is a contract for the sale of specific or ascertained goods, the title to them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. For the purpose of ascertaining the intention of the parties, regard must be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

II. Where the parties express no definite intention as to when the title to specific goods shall pass or have expressed it so imperfectly as to leave the matter in doubt, the following are the rules for ascertaining the legal intention of the parties as to the time at which the title to the goods is to pass to the buyer:

(1) Where there is an unconditional contract for the sale of specific goods, in a deliverable state, i. e., ready to be delivered, the title to the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or time of delivery or both is to take place in

the future.

## **EXAMPLE:**

Baker purchased from Allen 500 pounds of cotton, which goods were in a deliverable state. It was agreed between the parties that Baker was to have his wagons call for the cotton the following week.

After the contract of sale had been made the cotton burned without any fault of Allen's. Baker would have to pay for the cotton, since the title had passed to him before the fire.

(2) Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the title does not pass until such thing be done.

#### **EXAMPLE:**

In a contract of sale between Allen and Baker, it was agreed that Baker would take and pay for Allen's sewing machine, but that Allen would first have to have the machine repaired and also have the frame of the machine revarnished. The machine was destroyed without the fault of either party to the contract before it was put into the condition agreed upon. The loss would fall on Allen, inasmuch as something remained to be done by him before the machine would be in a delivery state. Cf. Clarkson v. Stevens, 106 U. S. 505.

(3) Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, then title does not pass until such act or thing be done.

## **EXAMPLE:**

Allen sold Baker all the wheat in a given warehouse. It was agreed in the contract of sale that the wheat was first to be tested and if found to be No. 1 then \$1 a bushel would be the price, but if found to be No. 2 wheat the price would be only 80c per bushel. It was also agreed that the number of bushels in the warehouse would be ascertained. In such a contract the title to the wheat would not pass to Baker until the wheat was tested and the number of bushels ascertained. Cf. Ockington v. Richey, 41 N. H. 275.

(4) Where goods are delivered to a buyer on a contract giving the buyer the option to return them, the title therein passes immediately to the buyer, subject to be revested in the seller if the goods be returned within the time allowed for such return, or, if no time has been fixed, then within a reasonable time.

#### **EXAMPLE:**

Allen sold Baker a horse with the understanding that if Baker did not like the horse he could return it at any time within two weeks after the contract of sale was made. Two days after Baker took possession of the horse, through an accident, the horse was killed. The loss in such a case would fall on Baker, inasmuch as the title passed to him subject to be revested in Allen if the horse was returned in the same condition as when borrowed and if returned within the time limit agreed upon.

(5) When goods are delivered to the buyer on approval, then the title does not pass to the buyer until he signifies his approval or acceptance to the seller or until he does some act equivalent to the signification of his approval, such as reselling the goods. If, however, the buyer retains the goods without giving notice of rejection for a longer time than has been agreed upon, or if he retains them for an unreasonable length of time when no definite time for a notice of rejection has been fixed upon, then the title passes to the buyer and he must pay for the goods.

### **EXAMPLES:**

I. Allen delivered a horse to Baker on approval for two weeks. A week after the horse had been delivered and before Baker signified his approval, the horse died. The loss would fall on Allen, as title had not yet passed.

2. Allen delivered a horse to Baker on approval for two weeks. Three days after the horse had been delivered to Baker, he (Baker) resold the horse to Carter and received the money for it. The next day after the resale, the horse was killed by accident. In such a case Allen could recover for the value of the horse from Baker, inasmuch as Baker had done the equivalent of signifying his approval by reselling the horse. Cf. Hickman v. Shimp, 109 Pa. St. 16.

(6) Where there is a contract for the sale of unascertained goods the title to the goods is not transferred to the buyer unless and until the goods are ascertained.

### **EXAMPLE:**

In a contract of sale between Allen and Baker it was agreed that Allen was to manufacture 500 desks in accordance with certain

specifications. The desks were manufactured in accordance with specifications and were all ready for delivery except that they required a last coat of varnish, when they were destroyed. The loss would fall on Allen, inasmuch as the desks were not in a deliverable state and, moreover, Baker had not yet had an opportunity of inspection. Cf. Comell v. Clark, 104 N. Y. 451.

(7) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the title of the goods thereupon passes to the buyer. The assent spoken of may be expressed or implied and may be given either before or after the appropriation is made.

#### **EXAMPLE:**

In accordance with the terms of a contract of sale, Allen manufactured 100 wagons for Baker. When the wagons were all ready for delivery, Baker's agent, Carter, called at Allen's place of business, examined the wagons and said they were satisfactory. A short while later the wagons were destroyed without fault on the part of Allen. The loss would fall on Baker, inasmuch as the goods had been unconditionally appropriated to the contract with the consent of the buyer.

ant to the buyer's direction, the seller delivers goods to the buyer or to a carrier (whether one named by the buyer or not) for the purposes of transmitting the goods to the buyer, and the seller does not reserve the right of the disposal of the goods, he is deemed to have unconditionally appropriated the goods to the contract and the title passes to the buyer. But the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled by the buyer. In such cases, notwithstanding the delivery to the buyer or to the carrier for purposes of transmission to the buyer, the title to the goods does not pass until the conditions imposed by the seller are fulfilled. And where goods are

shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* (on the face of the matter) deemed to reserve the right of disposal.

#### **EXAMPLES:**

- I. In accordance with the terms of a contract of sale, Allen delivered 100 buggies which he had manufactured for Baker to the Transcontinental Railway with directions to deliver the goods to Baker. Allen had the bill of lading for the goods made out to Baker and forwarded it to him. In case of loss it would fall on Baker, inasmuch as the goods had been unconditionally delivered to the carrier as agent for the buyer.
- 2. In accordance with the terms of a contract of sale, Allen manufactured 400 buggies for Baker. When the buggies were finished Allen delivered them to the Transcontinental Railway and marked the address of Baker thereon, but Allen took a negotiable bill of lading <sup>2</sup> from the railroad in his own name and to his own order. In such a case if the goods were destroyed in transit, the loss would fall on Allen, for he had still retained the right of disposal of the goods. Cf. Dows v. Bank, 91 U. S. 618, 631.
- § 218. Who Has the Risk.— Unless otherwise agreed, the goods remain at the seller's risk until the title therein is transferred to the buyer but when the title therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not. But where delivery has been delayed through the fault of either the buyer or the seller, then the goods are at the risk of the party in fault with reference to any loss which would not have occurred but for such party's negligence.

### III. Conditions and Warranties

- § 219. Definitions and Classifications.— A condition precedent in a contract of sale is a stipulation or undertak-
- (2) A negotiable bill of lading is both a written acknowledgment of the receipt of certain goods by a railroad or other carrier, and also a contract between the carrier and the shipper that the goods will be delivered at a certain place and to the person named in the bill of lading as consignee or to such person as the consignee named therein may designate.

ing, express or implied, whose fulfilment may be treated as essential to the transfer of the title in the goods, and the breach of which will give the buyer the right to reject the goods and treat the contract as repudiated.

A condition may be either express or implied. An express condition is one in which the stipulation or undertaking is expressed. An implied condition is one which the law

implies from the facts of the case.

A warranty, in the strict sense, is such a stipulation or undertaking, collateral to the transfer of the title in goods to the buyer, the breach of which gives rise to a claim for damages but not, in most States, to a right to reject the goods and treat the contract as repudiated.

A warranty may be either express or implied. An express warranty is one in which the stipulation or undertaking is expressly made. An implied warranty is one which, not being expressly made, the law implies from the facts of the

sale.

#### **EXAMPLES:**

Allen, a coal merchant, held an auction sale on January 1. 1900, at which time he sold Baker 1,000 tons of coal. It was expressly stipulated that Baker was to have the coal hauled away by the end of February, 1900, and that if he failed to do so, Allen might discontinue the delivery of the coal and might retain the earnest money paid by Baker at the time of the sale. Allen was ready to deliver the coal in February, but Baker failed to call for it. In July, 1900, when Allen had no coal on hand, Baker demanded delivery of the 1,000 tons. Allen refused to make the delivery, whereupon Baker brought suit. In a similar case the court said in delivering its opinion, "a failure of the buyer to take away all the coal bought, within the time specified, gave the defendant the right and power to refuse further delivery, and to forfeit the earnest money paid by the buyer. Hence their stipulation in the terms of the sale appears, from a fair consideration of the language of it \* \* \* to be of the essence of the contract, \* \* \* and to have formed a condition precedent, to be observed and kept by the plaintiff if he wished to be able to retain his contract and to have it enforceable against the defendant." Higgins v. Delaware G., 60 N. Y. 553.

2. Allen sold Baker 8,000 tons of pig-iron and agreed to deliver the entire quantity during the latter part of the year 1900 and the first part of the year 1901. Allen delivered only 3,000 tons in 1900 and 1,000 tons in the month of January, 1901. When Allen tendered 800 tons of iron in April, 1901, Baker refused to accept them on the grounds that it was an implied condition precedent of the contract that the iron must all be delivered in the latter part of the year 1900 and the first part of the year 1901 and that the delivery of a little more than half the amount agreed upon is not a reasonable satisfaction of a contract. Allen brought suit against Baker for breach of contract. Allen could not recover. The time and quantity of the shipment are the usual and convenient means of fixing the probable time of arrival of the goods with a view of providing funds to pay for them, or of fulfilling contracts with third persons. Norrington v. Wright, 115 U. S. 188.

3. Allen, a commission merchant, ordered from Baker 1,000 bushels of peas. When the time came for delivery, Baker tendered 1,000 bushels of beans, which Allen refused to accept. Baker brought suit. He could not recover. Where there is a contract for the sale of goods by description, there is an implied condition precedent that the goods shall correspond with the description and if they do not

correspond the buyer need not accept them.

4. In a contract of sale of a horse between Allen and Baker, Allen warranted that the horse sold was healthy and sound in every particular. This was an express warranty.

§ 220. Rules Governing Conditions and Warranties.— The rules governing conditions and warranties are these:

I. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is:

(1) An implied condition precedent on the part of the seller that, in the case of a sale he has a right to sell the goods; that in the case of an agreement to sell, he will have a right to sell the goods at the time when the title is to pass;

(2) An implied warranty that the seller has the title and that the buyer shall have and enjoy quiet possession of the goods as and against the seller and the lawful acts of third

persons;

(3) An implied warranty that the goods shipped are

free from any charge or encumbrance in favor of any third persons not declared or known to the buyer before or at the time when the contract is made.

II. Where a contract of sale is subject to any condition precedent to be fulfilled by the seller, the buyer may hold the contract as breached or he may, if he chooses, release the seller from the condition, or he may elect to treat a breach of such condition precedent as a breach of warranty and not as a ground for treating the contract as repudiated.

#### **EXAMPLE:**

In a contract of sale Allen agreed to deliver to Baker 10,000 bushels No. 2 red wheat. When the time for delivery came, Allen tendered Baker 10,000 bushels No. 3 red wheat. If he chose, Baker might have rejected No. 3 red wheat; or he might have accepted No. 3 red wheat and paid for same; or he might have accepted No. 3 red wheat and brought an action for damages against Allen on a breach of implied warranty for the difference in value in the market price of No. 2 and No. 3 wheat.

III. A sample is a small quantity of any commodity or merchandise accepted as a specimen of a larger quantity, called the bulk — a portion of merchandise shown as a specimen. A contract "for sale by sample" exists when there is a term in the contract, express or implied, to that effect. In the case of a contract of sale by sample:

(1) There is an implied condition precedent that the

bulk shall correspond with the sample in quantity;

(2) There is an implied condition precedent that the buyer shall have a reasonable opportunity to compare the bulk with the sample:

(3) There is an implied condition precedent, provided the seller is the manufacturer, that the goods shall be free from any defect arising from the process of manufacture and rendering them unmerchantable, if such defect could not have been observed in the sample upon reasonable examination thereof.

#### **EXAMPLES:**

I. Baker bought 110 barrels of apples from Allen as per sample. When the barrels of apples were opened it was found that they were all rotten. Baker refused to pay for them on the grounds that the apples did not correspond with the sample. Allen brought suit. He could not recover. Where there is a sale of goods by sample, the bulk of the goods must correspond with the sample. (Cf. Hanson v. Busse, 45 Ill. 496.)

2. In a contract of sale Baker contracted to take 1,000 pounds of rubber of second quality as per sample. Allen tendered 1,000 pounds of rubber which was as per sample, but which did not answer the description of second quality rubber. Baker refused to take the rubber and Allen thereupon brought suit. Allen could not recover. Where there is a contract for the sale of goods by description as well as by sample, not only must the bulk of the goods correspond to the sample but must also correspond to the description.

§ 221. The Maxim Caveat Emptor.— The general rule is well established that in the sale of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the goods and the seller is guilty of no fraud, the maxim caveat emptor — let the buyer beware — applies. Where this maxim prevails, the buyer takes the goods at his own risk of inspection.

The exceptions to this rule are as follows:

(1) The implied warranties of title and freedom from encumbrance hold good notwithstanding the rule of caveat emptor unless the sale is made under conditions which negative these implied warranties.

(2) There is an implied warranty that articles of food purchased from a dealer for domestic use, shall be wholesome and fit for use and this notwithstanding the rule of

caveat emptor.

(3) There is an implied warranty that goods purchased from a manufacturer shall be free from any secret defects, arising from the process of manufacture, that would render those goods unfit for the usual purpose to which they are put. This implied warranty has effect notwithstanding the rule of caveat emptor.

#### **EXAMPLES:**

1. Allen sold Baker a horse for \$150. Baker had an opportunity to inspect the horse. After Baker got the horse he found that it was blind in one eye. He thereupon demanded that Allen make him an allowance of \$50 for the defect. Allen refused to do so and Baker brought suit. He could not recover. The maxim of caveat emptor applies, for Baker had an opportunity to examine the horse for himself and if he failed to do so, he cannot saddle his loss on the seller. If, however, Allen had warranted the horse to be free from any such defects, then Baker would have had a right of action for breach of warranty. Cf. Barnard v. Kellog, 10 Wal. 388.

2. Baker purchased a horse from Allen and paid \$100 for it. Two weeks later Carter sued Baker for \$150. At the trial Carter proved that the horse had been stolen from him and he was, therefore, awarded a judgment against Baker for the value of the animal. Baker thereupon brought suit against Allen for the breach of the implied warranty of title. He could recover, for the maxim of caveat emptor does not apply in the case of failure of title, unless the sale is made under such conditions that it is evident that there is no such implied warranty, as for example, an auction sale held by a public

administrator or a trustee's public sale.

3. Allen, a butcher, sold Mrs. Baker three pounds of meat for family use. When the family of Mrs. Baker ate the meat, they became violently ill. It was later found that Allen had had the meat in his place for a long period of time and under such conditions that the meat was unwholesome. Mrs. Baker could recover damages from Allen for the breach of warranty to furnish wholesome food.

### IV. Duties of the Parties

§ 222. Duties of the Seller.— The duties of the seller in a contract of sale are as follows:

(1) He must transfer a valid title to the goods to the

buyer.

- (2) He must deliver the goods in accordance with the terms of the contract. If no place of delivery is fixed upon in the contract of sale, then the place of delivery is the seller's place of business or the place where the goods are at the time of the sale if such place be different than the seller's place of business.
  - (3) He must deliver the quality of goods specified.

(4) He must deliver the quantity of goods specified.

(5) He must fulfill all representations, conditions precedent and warranties made by him or his agent.

- § 223. Duties of the Buyer.— The duties of the buyer are as follows:
- (1) He must accept the goods if delivered in accordance with the terms of the contract.
  - (2) He must pay for the goods.

# V. Rights and Remedies of the Parties

§ 224. Unpaid Vendor's Rights Against the Goods.—An unpaid vendor has certain rights against the goods sold notwithstanding that the title to the goods has passed to the

buyer. Such rights are briefly as follows:

(1) If the vendor still has possession of the goods he has a lien 3 on them for the purchase price and he has a right to retain the goods, unless the sale was on credit and the time of the credit has not yet expired. The lien of the vendor for the purchase price exists only when the vendor has sold for cash; or when, having sold on credit, the time for the credit has expired before the delivery; or when, having sold on credit, the buyer becomes insolvent before delivery. The lien of the vendor is lost as soon as he loses possession of the goods, or as soon as the vendee tenders the purchase price.

(2) If the vendor has shipped the goods and they are still in transit and he then learns that the buyer is actually insolvent, he has the right of stoppage in transitu, i. e., the right of stopping the goods while in transit and gaining

possession of them.

The transit of goods begins at the moment when the vendor or his agent delivers the goods to the carrier. The transit is ended whenever the vendee or his agent gains possession of the goods or whenever the goods arrive at their

(3) A lien is the right of one party to retain in his possession goods, the title to which is another party until demands of the party in possession are satisfied.

destination and the carrier agrees to hold them as agent for the vendee. When the vendor wishes to exercise his right of stoppage in transitu, he must immediately notify the carrier of the fact. From the moment the carrier receives the notice he is under obligation not to deliver the goods to the vendee. If he does so he acts at his peril. If, however, a negotiable bill of lading has been issued from the carrier and this bill of lading has been transferred to an innocent purchaser for value, the vendor then loses his right of stoppage in transitu and the carrier may disregard the notice. In case of doubt as to what party to deliver the goods, the carrier usually delivers the goods to the vendor, who is required to post a bond to protect the carrier.

(3) If the vendee does not pay for the goods after a reasonable length of time and if the vendor still has a lien for the unpaid purchase price, or if, having exercised his right of stoppage in transitu, he has regained possession of the goods, he may either retain possession of the goods for his own use or he may resell them to some third person who would get a valid title thereto. In both of these cases the vendor may also recover damages from the buyer for the breach of contract for the loss sustained,

if any.

§ 225. Unpaid Vendor's Rights Against the Buyer for Breach of Contract.— Aside from the rights against the goods which the unpaid vendor has, he has also the following rights:

(1) If the vendee has the title and the possession of the

goods, the unpaid vendor may sue for the price.

(2) If the vendee has the title to the goods but not the possession, the unpaid vendor may tender the goods and, if the vendee refuses to accept them, the vendor may bring an action for the damages sustained from the breach of contract.

§ 226. Vendee's Rights.— The vendee has the following rights:

(1) If the title to the goods is in the vendee but the

vendor wrongfully refuses to deliver possession of the goods, the vendee may bring an action of replevin, i. e., an action to recover the specific goods, or he may sue the vendor in tort for conversion, i. e., an action to recover damages for the wrongful application of the goods.

(2) If the title to the goods has not passed and the vendor wrongfully refuses to deliver possession of the goods, the vendee may sue for the loss sustained by the

breach of contract of the vendor.

(3) The vendee has also his right to rescind the contract for the failure of a condition precedent and also the right to sue for breach of warranty.

## **FORMS**

§ 227. Bill of Sale With Warranty:

Know All Men by these Presents, That I, John Allen, of the City of St. Louis, Missouri, of the first part, for and in consideration of the sum of \$200 lawful money of the United States, to me this day in hand paid, by Thomas Baker, of Chicago, Illinois, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant, bargain and convey unto the said party of the second part, his executors, administrators, and assigns, my Cleopatra piano No. 406 to have and to hold the same unto the said party of the second part, his executors, administrators, and assigns, forever. And I do covenant with the said Thomas Baker that I am the lawful owner and have the right to sell and transfer the said property, and I will warrant and defend the title to same against the lawful claims of any person or persons.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 1st day of January in the year of our Lord Nine-

teen Hundred and Ten.

JOHN ALLEN. (SEAL)

Witness:

WM. CARTER.

State of Missouri)

ss.

City of St. Louis.

On this 1st day of January, in the year of our Lord One Thousand Nine Hundred and Ten, before me personally appeared John Allen, to me personally known to be the same person described in and who executed the foregoing instrument, and he acknowledged that he executed the same as his free act and deed.

Frederick Donald, Notary Public for St. Louis, Mo.

My commission expires Jan. 1, 1911.

(Notarial Seal)

[The notarial acknowledgment is not necessary unless the parties desire to record the bill of sale.]

§ 228. Statement to be Signed by Auctioneer After a Sale by Auction:

I, John Allen, auctioneer for Richard Baker, hereby state and acknowledge that Thomas Carter of 4453 Page Boulevard, Chicago, Illinois, has been this day declared the highest bidder and purchaser of (here describe the property) at the sum of (give amount); and that said Thomas Carter has paid into my hands the sum of (give the amount) as a deposit and in part payment of the purchase price of said merchandise; and I hereby promise and agree that the vendor, said Richard Baker, shall in all respects fulfil the conditions of the sale hereunto annexed.

Witness my hand and seal this 4th day of January, A. D. 1910.

JOHN ALLEN. (L. S.)

Auctioneer.

(Annex conditions of the sale to the memorandum here given.)

§ 229. Statement to be Signed by the Purchaser at an Auction Sale:

I, Thomas Carter, hereby state that I have this day pur-

chased at public auction from John Allen, acting as auctioneer for Richard Baker (describe the merchandise purchased) for the sum of (give amount) and that I have paid into the hands of said John Allen the sum of (give amount) as a deposit and in part payment of the purchase price agreed upon for said merchandise; and I hereby promise and agree to pay the remaining sum of (give amount) to the vendor, said Richard Baker, on or before the 11th day of January, A. D. 1910, at the business address of said Richard Baker; and in all other respects on my part to faithfully fulfil the annexed conditions of sale.

Witness my hand and seal this 4th day of January, A. D.

1910.

THOMAS CARTER. (L. S.)

Purchaser.

(Annex conditions of the sale to the memorandum here given.)

## **QUESTIONS**

I. What is a sale? What is an agreement to sell? What is a contract of sale?

II. What is the consideration in a contract of sale?

What is the lawful thing to be done in a sale?

Which section of the Statutes of Frauds applies to sales?

III. What is the meaning of the word "title"?

IV. Can the seller of goods convey a better title than he himself possesses? If so, in what instances?

V. Allen stole a book from Baker and sold it to Carter, who knew of the theft. Could Baker recover the book from Carter? Suppose Carter had known nothing of the theft. Could Baker recover the book in such a case?

VI. Allen offered to sell Baker a certain horse and buggy for \$150. After examining the articles, Baker found them satisfactory and he accepted Allen's offer. It was agreed between Allen and Baker, however, that Baker was not to pay for the horse and buggy until thirty days had elapsed. Shortly after the contract of sale was closed, but before Baker had taken the horse and buggy away, these articles were stolen without the fault of Allen. On whom would the loss in this case fall?

VII. Allen sold Baker an automobile for \$2,000 with the express understanding that if Baker did not like the machine, he could return it and Allen would refund the money. Baker kept the machine for about ten months and used it constantly during that entire period. At the end of the time, being hard pressed for money, Baker went to Allen and demanded the return of the \$2,000, offering at the same time to return the automobile. Allen refused to return the money, whereupon Baker brought suit. Decide the case, giving reason.

VIII. Allen purchased a suit of clothes on approval from the Baker Clothing Company. He took the suit home, tried it on and found it perfectly satisfactory. He then hung it up in his wardrobe and never wore it or returned it to the clothing company. After a period of two months the clothing company demanded payment for the suit of clothes, whereupon Allen offered to return it. The Baker Company brought suit for the value of the clothes. Decide the case, giving reasons.

IX. The Baker Company ordered Allen to manufacture one hundred roller top desks, as per certain specifications. When the desks were finished, Allen notified the Baker Company of the fact and he received a reply, in which it was stated that the company was willing to permit Allen to appropriate the goods to the contract, inasmuch as they had faith in his integrity. Ac-

cordingly, Allen made the appropriation and then without any fault on his part, the goods were destroyed by fire. On whom would the loss fall?

X. The Allen Company, of St. Louis, delivered to the Baker Railroad Company a shipment of ten automobiles consigned to one Carter, of Denver, Colo. The Allen Company had the bill of lading for the goods made out in its own name and then sent the bill of lading to its own regular agent in Denver, with instructions not to deliver it to Baker until he had made a payment of \$1,000 and had given his promissory note for the balance due. When the automobiles were en route to Denver, they were destroyed as a result of a hurricane. On whom would the loss fall and why?

XI. Define the terms "condition precedent" and "warranty." What are the rules governing

warranties and conditions precedent?

XII. What is the meaning and application of the phrase

caveat emptor?

Allen, who was a public administrator, took charge XIII. of the estate of Richard Baker, who had died without leaving a will. Among the effects of Baker which Allen found was an automobile. Allen held a public auction sale of Baker's effects and at this sale he sold the automobile to Carter. Two weeks after the auction sale, one Donald demanded from Carter the return of the automobile which Carter had purchased at the public auction sale. Carter delivered up the automobile to Donald, inasmuch as Donald proved that the automobile was really his and that it had been stolen by Baker. Thereupon Donald brought suit against Allen for a breach of implied warranty of title. Decide the case, giving reasons.

XIV. What are the duties of a seller in a contract of sale? What are the duties of the buyer?

XV. What are an unpaid vendor's rights against the

goods?

XVI. Allen sold Baker a book with the understanding that Baker was to pay cash for it. Baker did not pay for the book and, moreover, he demanded that Allen deliver it to him. When Allen refused to deliver up the book until it was paid for in full, Baker brought a replevin suit; i. e., a suit to get possession of the book, the title to which he claimed was in himself and not in Allen. Decide the case, giving reasons.

XVII. What are the unpaid vendor's rights against the

vendee for breach of contract?

XVIII. What are the vendee's rights?

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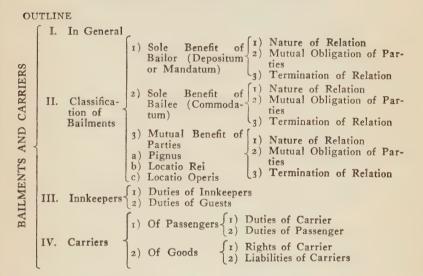
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## **Duties of Carriers**

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### **Duties of Passengers**

§ 278. Duty to be orderly and to pay

§ 230. In General.— A bailment is a contract relation resulting from the delivery of chattels by one person, called the bailor, to a second person, called the bailee, for a specific purpose, upon the accomplishment of which the chattels are to be dealt with in accordance with the bailor's direction.a If we analyze this definition, we find the following: A bailment is a contract relation. This contract relation is one which has to do with chattels or goods which are capable of being manually delivered, and not with real estate. The contract rests upon the delivery of chattels by the bailor to the bailee. The delivery of the chattels is not for the purpose of passing the general title to the bailee, as in the case of a sale, but is merely to pass possession and the right of possession to the bailee, so that he can accomplish a specific purpose after which he must dispose of the chattels in accordance with the bailor's directions.

#### **EXAMPLES:**

1. Allen delivered a horse to Baker, a livery stable keeper, with the understanding that Baker was to see that the horse was properly lodged and fed for the period of one month. In this case Allen was the bailor and Baker the bailee. The chattel delivered was the horse. The specific purpose for which the bailment was created was the lodging and care of the horse.

2. Allen, an agent for the Carter firm, delivered one hundred bushels of wheat to Baker, a mill owner, with the understanding that Baker was to grind the wheat into flour and return the flour to Allen, for which labor Baker was to be paid a certain sum per bushel. This was a bailment for the purpose of milling wheat. Either party to a bailment may act through an agent and deliver by or to an agent. Delivery by or to an agent is equivalent to delivery by or to his principal.

3. Baker found a book, on the fly leaf of which was written, "This book is the property of John Allen, residence 4400 Grand Blvd., New York City." In this case, although there was no delivery of the book by Allen to Baker and although no specific purpose was mentioned, yet a bailment exists. Where one finds chattels be-

<sup>(1)</sup> The word "bailment" is derived from the Norman French bailleur, meaning to deliver.

<sup>(</sup>a) Cf. Goddard on Outlines of Bailments and Carriers, § 1.

longing to another, a delivery of the chattels is presumed to have taken place by operation of law. The law also implies that this specific purpose for which the delivery has taken place is to make a reasonable effort to find the owner of the property, and to notify him that you hold the goods subject to his calling for them.

- 4. Allen had a warehouse full of grain. Allen wished Baker to act as his watchman of the grain during the summer. As it would have been entirely impracticable for Allen to have transported the grain from the warehouse when making a delivery, he delivered the key of the warehouse to Baker, who accepted it. This would be a valid bailment of the grain. Wherever, because of the circumstances or nature of the chattels, actual delivery is inconvenient or useless, then what is known as constructive delivery (which is equivalent in the eyes of the law to actual delivery) may take place.
- § 231. Classification.— Judge Story in his classic work on Bailments was the first to suggest a classification of the subject based on the purpose for which the bailment was made. He divided bailments into three classes:
  - I. Bailments for the sole benefit of the bailor.
- II. Bailments for the sole benefit of the bailee.
- III. Bailments for the mutual benefit of both parties.

# I. Bailments for the sole benefit of the bailor

§ 232. Deposits and Mandates Defined.— A bailment for the sole benefit of the bailor is either a deposit, called in the Roman law depositum, or a mandate, called in the Roman law mandatum. A deposit (in bailments) is a bailment in which the bailor gives a chattel to the bailee, who is to take care of it without receiving any reward, and who obligates himself to deliver the chattel in accordance with the bailor's directions. A mandate (in bailments) is a bailment in which the bailor gives a chattel to the bailee, who is not only to take care of the chattel without receiving any reward, but who is also to do some work about it free of charge, and who obligates himself to deliver the chattel in accordance with the bailor's directions.

#### **EXAMPLES:**

I. Allen was about to leave the city for the summer. Inasmuch as he did not desire to leave his valuable violin in an unoccupied apartment, he requested his friend, Baker, to keep the violin in his iron safe. Baker received the violin from Allen and agreed not to charge Allen anything for taking care of it over the summer. This was a deposit.

2. Allen's watch was out of order. He gave it to his friend Baker, a watchmaker, who agreed to fix it free of charge. This was

a mandate.

#### Nature of the Relation

- § 233. How Created.— Deposits and mandates are usually created by the act of the parties. Sometimes, however, deposits arise by act of law. If, for example, a party finds and takes charge of goods belonging to another, or if through a flood or other disaster goods are cast upon the land of one not their owner, a deposit by act of law is created.
- § 234. No Compensation.— The distinctive feature of bailments for the sole benefit of the bailor is that the bailor is not to pay the bailee any compensation for taking care of, or for making improvements in, or repairs upon, the chattel.

# Mutual Obligations of the Parties

- § 235. Obligations of the Bailor.— As has been previously indicated, in this class of bailments the bailor owes no duty of compensation to the bailee, but the bailor must reimburse the bailee for any extraordinary expenses, not occasioned by the fault of the latter, that may become necessary for the preservation of the chattel, unless there is an understanding to the contrary. The bailor also owes the duty of informing the bailee of any secret defects in the bailed article, which are, or reasonably ought to be known by the bailor, and which are likely to be a source of danger to the bailee.
  - § 236. Duties of the Bailee. Any time before one who

agrees to become a gratuitous bailee, receives the chattel, he may alter his intention and may refuse to enter upon the bailment without incurring any legal liability for his refusal. The reason for this is that a promise by one party to do something for another party, without compensation, is not supported by a valuable consideration, and is, therefore, not enforceable. But if the proposed bailee receives the chattel, with the understanding that he will do certain things, a consideration thereupon arises in the eyes of the law. This consideration is not, however, the benefit accruing to the bailee, for he receives nothing, but it is the legal detriment suffered by the bailor in temporarily giving up his possession of the chattel to the bailee and in preventing the bailor from getting someone else to take charge of the chattel.

After the bailee of a gratuitous bailment assumes charge of the bailed chattel, his duties to the bailor are as follows:

(1) The bailee must use at least slight diligence in taking care of the bailed article, or in other words, he must not by gross negligence injure, destroy, or lose the goods. It is very difficult to give any general rule by which to determine slight negligence, for the nature and value of the bailed chattel, and the circumstances surrounding each case, vary greatly, and these are the factors to be considered in determining if the bailee has been derelict. Probably as good a distinction as one will find is that given by Goddard in his Outlines on Bailments and Carries: "Ordinary diligence is such as an ordinarily prudent man is wont to exercise in the conduct of his own affairs of like kind. than this is slight diligence, more, is great diligence." The failure by the bailee to exercise slight diligence is said to indicate that he was grossly negligent; the failure to exercise ordinary diligence indicates that he was guilty of ordinary negligence; and failure to exercise great diligence indicates that he was guilty of slight negligence.

### **EXAMPLE:**

Allen requested his friend, Baker, to take care of two valuable diamond rings for him without compensation. Baker took charge of

the rings and then carelessly put them on top of his desk in his feed store, where he well knew that strangers were constantly passing by the desk and could easily steal the rings. The rings were stolen the first day that they were on the desk. In such a case Baker did not use slight care, or he was guilty of gross negligence. If, however, instead of two diamond rings, the bailed chattels had been two old books of very little value, Baker would probably not have been guilty of gross negligence.

(2) The bailee must possess such skill as he represents that he possesses, notwithstanding that he is to receive no compensation for his services.

#### **EXAMPLE:**

Baker represented to Allen that he was an experienced watch-maker. Allen's watch was running a little fast, so he asked Baker if he could not fix it for him. "Oh, yes," Baker replied, "just leave it with me for a few days and I will regulate it for you without charge." The fact developed later on that Baker knew nothing whatever about fixing watches and through his lack of knowledge, he badly injured Allen's watch in attempting to repair it. Baker would be guilty of gross negligence and would be liable for the injury done.

(3) The bailee must not use the bailed chattel except as its use is necessary for the proper preservation of the article.

#### **EXAMPLE:**

Allen left his valuable race horse in the care of Baker, a friend, who agreed not to charge Allen anything for taking care of the horse. Without Allen's consent, Baker took the horse out a half an hour each day, to exercise it. During this exercise period, one day, the horse was accidentally killed. Baker would probably not be liable for the injury, inasmuch as it is ordinarily necessary to exercise a race horse a short period each day. If, however, Baker had been out with the horse for a pleasure ride and the animal had been killed, even without any fault on Baker's part, he would nevertheless be liable for the loss, inasmuch as he violated his legal duty not to use a bailed chattel without the consent of the bailor.

#### Termination of the Bailment

§ 237. By Act of Parties, or by Operation of Law.—Bailments like all other contracts may be terminated by act of the parties, or by operation of law. In a case of a bailment for the sole benefit of the bailor, inasmuch as the bailee has nothing to gain by continuing the contract, the bailor, therefore, may terminate the relation at any time. He must, however, have a reasonable regard for the convenience of the bailee and he must give the latter a reasonable time in which to redeliver the article. The death, bankruptcy, or insanity of either party to the relation is also usually held to terminate the bailment by operation of law.

# II. Bailments for the sole benefit of the bailee

§ 238. A Gratuitous Loan.— There is only one class of bailments for the sole benefit of the bailee, and this class is known as the gratuitous loan, called in the Roman law the commodatum. As used in bailments the phrase "gratuitous loan" refers to the loan of an article by the bailee or borrower from the bailor or lender, with the understanding that the bailee is to have the use of the article and is not to pay the bailor any compensation or reward for such use.

## Nature of the Relation

§ 239. How Created.— Inasmuch as the law never compels one party to lend his chattels to another party without compensation, the only manner in which gratuitous loans can be created is by the voluntary act of the bailor in permitting the bailee to use his chattels.

§ 240. No Compensation.— As in the case of bailments for the sole benefit of the bailor the bailee received no compensation whatever, so the distinctive feature of bailments for the sole benefit of the bailee is that the bailor is not to receive any compensation or reward for the use of his chattels.

# Mutual Obligations of the Parties

§ 241. Obligations of the Bailor.— The bailor owes the bailee no obligations whatever in this class of bailments, except that if there are any secret defects in the article loaned, which defects would render the use of such article dangerous to the bailee, then, if the bailor knows of such defects, he must give timely notice to the bailee, so that the latter party may protect himself from injury.

§ 242. Duties of the Bailee.— Unless the duties of the bailee are fixed by special agreement at the time of the loan,

the following general rules will apply:

(1) The bailee must exercise the greatest degree of care in keeping or in using the article and, although he is not held to be an insurer, yet he is liable for the slightest negligence which results in injury to, or loss of the article. It has sometimes been said that in case of fire, or other peril, the bailee, in gratuitous loans, must attempt to save the bailed chattel in preference to his own. But this cannot be given as a definite rule. If, for instance, the bailed chattel were very bulky and heavy and of little value, while the bailee's properties were very small and light and of great value, the bailee would no doubt be entirely justified in saving his own property to the exclusion of the bailed chattel. The best that can be said in cases of negligence is that each case rests upon its own merits, and it is for the jury to decide under proper instructions from the court whether the bailee has exercised the proper degree of care, or whether he is guilty of negligence.

(2) The second rule which the gratuitous bailee must observe is that he may use the bailed article only for the purpose and in the manner agreed upon when he made the loan and, moreover, he must not lend the bailed chattel to a third person, unless he first obtains the consent of the bailor to such loan. If the bailee violates this rule, he becomes an insurer of the goods and he may be held liable in

a tort action for conversion.

#### **EXAMPLE:**

Baker borrowed Allen's horse with the understanding that the horse was to be used to pull a light buggy. The day after the loan was made, Baker hitched the horse to a heavy sprinkling wagon. The horse was permanently injured in pulling the wagon. Baker was guilty of conversion. He is liable for the full value of the horse. It was his duty not to deviate from the understanding originally reached as to the purpose for which the horse was to be used. Cf. Lane v. Cameron, 38 Wisc. 603.

(3) It is the bailee's further duty to redeliver the bailed chattel to the bailor, together with any increase thereto, which may have accrued during the interim of the loan, upon the expiration of the time for which the loan was made or, if no time was agreed upon, then upon the expiration of a reasonable length of time after demand is made for the return of the article.

#### **EXAMPLE:**

Baker borrowed Allen's cow for an indefinite length of time. Three months after the loan was made a calf was born to the cow. Six months later Allen demanded the return of the cow and the calf. Baker returned the cow, but refused to return the calf. Allen brought suit against Baker for the value of the calf. Allen was entitled to a judgment, inasmuch as the bailed chattel together with any increase thereto belongs to the bailor, unless the parties make an agreement to the contrary.

## Termination of the Relation

§ 243. By Act of Parties.— Gratuitous loans may be terminated at the will of the bailor, unless a definite time has been allowed the bailee to use the chattel, in which case the bailee may retain the chattel until such time has expired. The bailee may also terminate the relation at his will by simply redelivering the bailed article to the bailor.

§ 244. By Operation of Law.— The death, or insanity, of the bailor terminates the bailment, and so also the death or insanity of the bailee terminates the bailment, unless the bailment was for a specific purpose, or for a definite period of time, in which case the bailee may retain the chattel until

the purpose is accomplished, or the time has expired, when he must redeliver the chattel to the bailor, or his representatives.

# III. Mutual Benefit Bailments

§ 245. Classification.— Bailments for the mutual benefit of bailor and bailee include the following:

a. The pignus, pawn, or pledge.

b. The locatio rei, or the hired used of a chattel.

c. The locatio operis, or the hired services to keep, re-

pair, or transport a chattel.

§ 246. Consideration.— Before considering the various kinds of mutual benefit bailments, the attention of the student is directed to the fact that in this class of bailments some legal benefit, however slight, must accrue to both parties to the relation. If there is no legal benefit or consideration to support the bailment, it is then not a mutual benefit relation and it must be classified as either a bailment for the sole benefit of the bailer, or a bailment for the sole benefit of the bailer.

# A. A Pignus or Pledge

§ 247. Definitions.— A pignus, or pawn or pledge,<sup>2</sup> is a bailment of a chattel to secure the performance of a legal obligation with power of sale in case of default in performance. The bailor in the pledge contract, or in other words, the one who gives his property as security is called the pledgor. The bailee, or the one who takes the property as security, is called the pledgee.

## **EXAMPLES:**

- 1. Allen wished to borrow \$100 from Baker. In order to get the money, Allen was obliged to give his watch to Baker as security for the debt, and also to give him the power of selling the watch in case that he (Allen) did not receive the \$100 at the time agreed upon. This was a pledge.
  - 2. Allen entered into a contract with Baker, in which it was
- (2) Hereafter only the word "pledge" will be used to designate this kind of a bailment.

agreed that Allen was to work for Baker for one month, in consideration for which Baker was to pay Allen \$500. Inasmuch as Baker wished to be protected in case Allen failed to do the work agreed, the latter party gave his diamond ring as security for the performance of his contract. The diamond ring was accordingly held as a pledge.

§ 248. A Pledge Not a Primary Contract.— It will be noted that there are always two contracts where there is a pledge. First, there is the primary contract, in which one party agrees to perform some legal obligation; and second, there is a pledge, in which a bailment is created, in order to make certain the carrying out of the first contract. Thus, in Example 1 illustrating the preceding paragraph, the primary contract deals with a loan of the money by Baker to Allen and the promise by Allen to repay the money. The secondary contract was the pledge or, in other words, the delivery of the watch by Allen to Baker in order to protect Baker.

# Mutual Obligation of the Parties Rights and Obligations of the Pledgor

§ 249. Warranty of the Pledgor.— The pledgor impliedly warrants that the pledgee shall enjoy possession of the pledged article until the purpose for which the bailment relation was created has expired. Therefore, if through legal proceedings the pledgee is deprived of his possession of the chattel before the satisfaction of his debt or other obligation, he has a right of action against the pledgor for damages.

§ 250. The Right to Redeem.— The pledgor of property has the right to redeem his pledge on the performance of his obligation. He also has the right to assign his inter-

est in the pledged article to some third person.

# Rights and Duties of the Pledgee

§ 251. Care Required of Pledgee.— The pledgee must use ordinary care in keeping the pledged article, and he is liable for damage to, or loss of the article, provided such

damage or loss was due to ordinary negligence on his part. The pledgee may not use the pledged article unless his use is absolutely necessary to preserve the article. The pledgee must redeliver the pledged article as soon as the performance of the obligation, for which the pledged article was

given as security, is fulfilled.

§ 252. Pledgee's Right of Sale.— The pledgee has the right to sell the pledged article if the primary contract; i. e., the legal obligation for the performance of which the article was given as security, is not fulfilled. If the pledge is for a debt, then the pledgee must return to the pledgor any surplus which he obtains from the sale over and above the amount of the debt, interest, and the expense of the sale. If there is no provision in the pledge contract to the contrary, the pledgee must sell at a public sale and must give notice to the pledgor of the time that the sale is to take place.

### Termination of the Relation

§ 253. By Act of the Parties, or by Operation of Law.

— The pledge relation may be terminated in the following manner:

# I. By Act of Parties

- (1) The pledgor may perform his primary contract and thereby have a legal right to have the pledged article returned to him at once.
- (2) The pledgor may default in the performance of his primary contract, and thereby give the pledgee the right to sell the article.
- (3) The pledgee may also voluntarily and without compensation surrender the pledged article.
- (4) The pledgee may so use the pledged article as to forfeit his right to retain it.

# II. By Operation of Law

(1) The pledged article may be destroyed by fire, cyclone or in some like manner without the fault of either party.

§ 254. The Primary Contract.— The mere fact that the pledged relation comes to an end does not mean that the primary contract is also thereby terminated. If, for example, the pledgee by misusing the pledged article should forfeit his right to retain it, he would not therefor lose his right to have the pledger perform the original contract to secure which the pledge was given. So also if the pledged article was destroyed by fire, this would not release the pledgor from performing his primary contract.

### B. Locatio Rei

§ 255. Definition and Explanation.— Locatio rei is the hired use of a chattel by the bailee. In order to create this bailment relation, a number of things must concur. First, a chattel must be delivered by the bailor to the bailee; second, the bailee must be given the right to use the chattel in accordance with the terms of a contract of hiring; third, it must be contracted that some recompense is to be paid by the bailee to the bailor for the use of the article.

The bailor, or the one who lets the article, is called the

letter, and the one who hires it is called the hirer.

## **EXAMPLE:**

Allen owned a threshing machine which Baker desired to use. Baker called on Allen and offered to pay him \$100 for the use of his threshing machine for two weeks. Allen accepted Baker's offer.

If Baker delivered the chattel to Allen as agreed, then the bailment relation, the *locatio rei*, or the hired use of the article, would spring into being. But if Baker refused to deliver the threshing machine as agreed, or if Allen refused to accept the threshing machine as agreed, then the bailment relation would not spring into being, for, as the student will remember, delivery is one of the essentials of bailment. In case, however, that either the bailor or bailee did refuse to carry out his contract, the other party to the relation would have a cause of action for breach of contract.

# Mutual Obligations of Parties

§ 256. Rights and Liabilities of the Bailor.— The bailor, or the letter, warrants that he has the right to give

legal possession of the bailed chattel to the bailee or hirer during the period for which the contract was made, free from disturbance by any one through legal means. The bailor must also warn the bailee of any defects in the bailed chattel, of which he is, or ought to be aware, if such defects would render the article dangerous for the purpose for which it was hired. The letter is not obliged to provide against ordinary wear and tear caused by the use of the bailed chattel, nor need he pay for the keep of hired animals, but he must pay any extraordinary expense necessarily incurred in preserving the chattel from injury due to unexpected causes not occasioned by the fault of the hirer.<sup>b</sup>

§ 257. Rights and Duties of the Bailee.— Inasmuch as the purpose of this class of bailments is the use of a bailed chattel, it is almost unnecessary to say that the bailee or hirer is entitled to the exclusive use and control of the bailed chattel for the purposes agreed upon during the period of

hire.

The bailee or hirer is obliged to use ordinary care in keeping the bailed chattel, and he is liable for ordinary negligence in case of loss or injury. If, however, the hirer departs from the terms of the contract of bailment and uses the chattel otherwise than agreed upon, he then becomes an insurer of the chattel and he is liable for its loss or injury, regardless of whether he was or was not negligent.

## **EXAMPLES:**

1. Baker hired an automobile from Allen. In driving the car one of the tires was accidentally punctured. Baker would not be liable for this damage, provided he was not guilty of ordinary negligence; i. e., of the absence of such care as an ordinarily prudent man would use driving his own car.

2. Baker hired a horse from Allen with the express understanding that he was to drive the horse over the St. Charles Road from St. Louis to St. Charles, both of said places being in Missouri. In direct violation of his contract, Baker drove the horse from St. Louis, Missouri, to Venice, Illinois, and on the way the horse was accidentally

# (b) Cf. Goddard on Bailments, § 114.

killed without the fault of Baker. Baker would be liable for the value of the horse, inasmuch as he was guilty of conversion when he departed from the terms of the bailment contract.

The bailee is liable to third persons for injuries resulting to them due to his negligence or to that of his servants in the use of the bailed article, but the bailee also has a corresponding right in that he has a cause of action against third persons who injure the chattel.

#### **EXAMPLES:**

I. Allen rented an automobile to Baker for one week. During the week Baker drove the automobile so recklessly that he ran over and seriously injured Carter. Baker, and not Allen, would be liable for this injury.

2. Baker rented a bicycle from Allen. Carter maliciously stuck a pin in the tire, thereby puncturing it. Baker would have a cause of

action against Carter for damage to the bicycle.

The bailee is bound to compensate the bailor for the use of the chattel in accordance with the terms of the contract, or if no definite terms were agreed upon, then a reasonable compensation must be paid.

The bailee must redeliver the chattel at the expiration of

the time agreed upon.

### Termination of the Relation

By Act of Parties, or by Operation of Law

§ 258. Manner of Terminating Relation.— The relation may be terminated in the following manner:

(1) The time for which the contract was to run may

expire.

- (2) The bailee may voluntarily surrender the bailed chattel to the bailor.
- (3) The bailee may depart from the terms of the bailment contract, thereby giving the bailor the right to terminate the relation and to sue for breach of contract.
- (4) The bailed chattel may be lost or destroyed, but if said loss or destruction is caused by the act of either party, such party is liable for damages.

# C. Locatio Operis

§ 259. Definition and Discussion.— The third class of mutual benefit bailments is called the *locatio operis;* i. e., hired services about a chattel. These hired services about a chattel may exist either, first, when the bailee takes care of the chattel for a compensation; i. e., exercises custody over it, for example, as a warehouseman, wharfinger, and liveryman; second, when a bailee for a compensation repairs a chattel, as a watchmaker repairs a watch; or third, when a bailee, for a compensation, is to carry or transport a chattel, as an expressman carries goods.

#### **EXAMPLES:**

1. Allen stored his automobile in Baker's garage, it being agreed that Baker was to take care of the automobile for the sum of \$20 per month. This was a bailment for the hired custody of a chattel for a compensation.

2. Allen sent his piano to Baker's shop to have Baker make some repairs on it. This was bailment for the hired repair of a chattel.

3. Allen employed Baker, an expressman, to haul a stove from Fourth St. and Washington Ave. to Taylor and Page Aves. in the city of St. Louis. This was a bailment for the hired transportation of a chattel.

§ 260. Rights and Obligations of the Bailor.— The bailor, in this class of bailments, must compensate the bailee for his services. The compensation to be paid is either fixed in the contract of bailment, or is a reasonable charge for services of a similar character made by others engaged in the same kind of a business. The bailor must also warn the bailee of any defects in the chattel known to him (the bailor), if such defects would make the chattel dangerous to the bailee. The bailor has the right to demand and compel the return of the chattel if the bailee departs from the

(3) A warehouseman is a person who receives goods and merchandise to be stored in his warehouse for a compensation.

(4) A wharfinger is one who owns or keeps a wharf for the purpose of receiving goods and taking care of them, or receiving and shipping goods to and from the wharf, for a compensation.

bailment contract and deals with the chattel otherwise than

as agreed.

§ 261. Rights and Duties of the Bailee.— Upon the performance of his duties, the bailee has the right to demand his compensation, and if the bailor fails to pay this compensation, the bailee may retain the chattel until the bailor does pay. The constitutions of many states give the bailee the right to sell the chattel after a reasonable time has expired, if the bailor fails to pay.

The bailee has the duty of exercising ordinary diligence in the care, keeping or transportation of the bailed article, and if he fails to exercise such diligence, he is liable to the

bailor for any loss that ensues.

### Termination of the Relation

By Act of the Parties, or by Operation of Law

§ 262. Manner of Terminating Relation.— This class of bailments may be terminated in the following manner:

1. The parties may fully perform their contracts.

2. The bailee may refuse to carry out his contract and may return the chattel to the bailor, thereby giving the bailor a right of action for damages for breach of contract.

3. The bailee may depart from the terms of the contract, in which case the bailor may, at his option, terminate the contract and compel the return of the chattel, or he may sue the bailee for conversion.

4. The bailee may destroy the chattel, thereby becom-

ing liable for its value.

5. The chattel may be destroyed without the fault of either party, in which instance the bailment relation is terminated by operation of law and the bailee is entitled to compensation for the work performed.

# Inn Keepers and Common Carriers

§ 263. In General.— Aside from the class of *locatio* operis bailments last discussed, there are two other classes which, because of historic reasons, have been termed extra-

ordinary or exceptional Locatio Operis bailments. In the extraordinary or exceptional locatio operis bailments, the rule requiring the bailee to use only ordinary care does not apply. The special rules of care applicable to these classes of bailments, which embrace, first, inn keepers, so far as their responsibility is concerned for the personal property of their guests, and second, common carriers, so far as their responsibility for the merchandise transported by them, will now be discussed.

# Inn Keepers

§ 264. Introductory.— The relation of inn keepers toward the persons of their guests is not strictly a bailment relation, inasmuch as bailments deal only with chattels. The relation of inn keepers toward the persons of their guests has, however, many points of similarity with the bailment relation. Inasmuch as we are to consider the relation of inn keepers toward the chattels of their guests, it is more convenient to treat at the same time the relation of inn keepers toward the persons of their guests than to reserve the latter topic for special consideration.

§ 265. Definitions .- An inn keeper, or hotel keeper, is a person who represents himself as being prepared to give lodging or other entertainment to the full capacity of his house to all respectable transients (temporary sojourners or travelers) who may choose to apply to his place of business ready and willing to pay his regular price for their accommodations. It has been held that sleeping car companies and steamship companies are not to be classified as The rule is also well established that boardinns or hotels. ing houses, lodging houses, and restaurants are not to come under the rules for inns or hotels. In the case of Pinkerton v. Woodward c it was held that the distinction between a hotel keeper and a lodging house keeper is that the latter is at liberty to choose his guests, while the former must reserve and furnish accommodations, so far as the size of his establishment permits, to all such respectable transients as

<sup>(</sup>c) 33 California, 557.

may choose to apply to his establishment, provided they are

prepared to pay for what they get.

Having considered who an inn keeper is, we must now determine who a transient is and when he becomes a guest. A transient is a person who is a traveler, a wayfarer, or a temporary sojourner. "He may be a resident of the same town with the inn keeper, if he comes as a traveler, and not as a neighbor or friend." The only essential is that he be a person whose stay is more or less temporary or uncertain.d

"A guest is a transient who resorts to an inn, as such, and is accepted by the inn keeper." By indicating that a transient must be accepted by the inn keeper before he becomes a guest is simply meant that something must be done by the inn keeper, or his agent, to indicate that he is willing

to give the party accommodations.

## **EXAMPLE:**

Allen lived a mile from Baker's hotel, which was located on the outskirts of Chicago. One night Allen went to Baker's hotel, engaged a room, paid for it and stayed all night at the hotel. When Allen awakened, he discovered that his suit-case, containing his wearing apparel, had been stolen from his room during the night. Allen demanded that Baker replace the stolen articles or pay for them. Baker refused, whereupon Allen brought suit. He could recover, inasmuch as he was a temporary sojourner at the hotel who had paid the price demanded. Cf. Walling v. Potter, 355 Conn. 183.

# Duties of an Inn Keeper

§ 266. Duty to Receive.— It is the duty of an inn keeper to receive at his inn all persons who may see fit to apply, provided they are orderly and are not afflicted with a contagious disease, and provided further they are able and ready to pay the regular price for their accommodations. It is also the inn keeper's duty to receive a reasonable amount of personal property which the guest brings with him. The personal property brought by the guest for his

<sup>(</sup>d) Goddard on Outlines of Bailments, § 171.

<sup>(</sup>e) Goddard on Outlines of Bailments, § 170.

use while on the journey, or for his use after the termination

of the journey, is called baggage.

§ 267. Liable for Loss of Baggage.— The decisions covering the liability of inn keepers for the loss of their guest's baggage are by no means harmonious. The weight of authority seems to be that the inn keeper is an insurer of his guest's goods, and that he is liable for the loss or destruction of such goods, except if such loss or destruction is caused by the act of God, (for example, a cyclone or a flood), the public enemy, or the negligence of the guest himself. In some States it is held that the inn keeper is also excused from liability if he can prove that the loss or destruction of the goods was due to an inevitable accident, (i. e., an unforeseen occurrence over which he himself had absolutely no control, such as a fire), or an irresistible force. In many States statutes have been passed providing that if the inn keeper will provide a safe in which to keep the valuables of his guests, he will then be relieved of all liability for loss of such valuables as might have been deposited in the safe, but were not so deposited.f

§ 268. The Lien of Inn Keepers.— Inasmuch as inn keepers are obliged to furnish entertainment to all who may apply, and inasmuch further as they are liable for the loss of the goods of their guests, they have been given an exceptional right which some bailees do not have; viz., a lien for their charges on the baggage of their guests. There are statutes in every State regulating the rights of the inn keeper in regard to the sale of their guests' baggage in case of non-payment of charges.

## Duties of the Guests

§ 269. Duty to be Orderly and Duty to Pay for Accommodations.— It is the duty of the guest of an inn to be orderly; i. e., not to engage in loud and vulgar quarrels which would tend to disturb the other guests. It is also the duty of the guest to pay the price agreed upon, or if no price was

<sup>(</sup>f) Goddard on Outlines of Bailments, § 185.

fixed, then to pay the customary price for the entertainment received.

# Termination of the Relation

§ 270. By the Inn Keeper and by the Guest.— The inn keeper must keep the guest so long as he acts in an orderly manner, pays his bills and does not contract any contagious disease. A guest has a legal right to leave an inn at any time he sees fit. If, however, he has contracted to stay a definite length of time and he fails to do so, he is then liable for breach of contract. And if a guest receives accommodations at an inn and then attempts to leave without paying for such accommodations, although his person cannot be attached, yet his baggage may be seized and held by the inn keeper under what is known as the inn keeper's lien. In some States statutes have been enacted, making it a criminal offense for a person to obtain accommodations at an inn and then later refuse to pay for what he has received.

## Common Carriers of Goods

§ 271. Definitions.— A private carrier of goods is one who undertakes to transport chattels of such persons as he sees fit to serve either gratuitously or for a compensation. A common carrier of goods is one who undertakes to transport chattels from place to place for any and all persons who may choose to employ and remunerate him.

§ 272. Rights and Liabilities of Common Carriers.

— From the definition of a common carrier it will be seen that he has at least two distinguishing characteristics:

(1) He represents to the public, either expressly or impliedly, that he is ready to carry for all persons indifferently and at any time while he is a common carrier.

(2) In his capacity as common carrier, he is to receive

a compensation for his services.

The law further provides in regard to common carriers as follows:

(1) He must determine and let the public know what

kind of goods he will carry and he must then carry goods of that character for any and all persons.

(2) He must fix a route by which he will travel and he must then transport goods over that particular route.

## **EXAMPLES:**

I. The Allen Company built a railroad from Chicago to St. Louis under franchise as a common carrier. Baker requested the Allen Railroad to carry a shipment of coal from St. Louis to Chicago. The manager of the railroad refused to carry the shipment in the cars of the Company, and gave as his reason the fact that he himself owned a coal mine along the route and that it would hurt his private business to carry the coal of his competitor. The Allen Company would be liable for damages for the refusal of its manager, inasmuch as it is the duty of a common carrier to transport goods for any and all persons who may see fit to apply to it regardless of the personal interests of the representatives of the company.

2. The Allen Company refused to accept from Baker a shipment of dynamite on the grounds that it would endanger life to transport such an article. Baker would have no right of action against the company for its refusal to carry goods the transportation of which might endanger the lives of the employees of the company.

3. The Allen Company was a common carrier which held itself out to the public to carry only poultry and eggs. Baker demanded that the Allen Company should transport for him a shipment of furniture. Upon the refusal of the company to do so, Baker brought suit for damages. He could not recover, inasmuch as a common carrier is obliged to transport only such goods as it holds itself out to the public to be prepared to carry.

4. Baker requested the Allen Company, a common carrier, to transport fifty carloads of lumber for him. The Allen Company refused to accept the goods for carriage until Baker paid the cost of transportation. Baker brought suit against the Allen Company for damages for refusal to carry the lumber. He could not recover, inasmuch as the Allen Company has the legal right to demand that its compensation be paid in advance.

§ 273. Carrier's Liability for Loss or Damages.— In the early common law a common carrier was held liable for the loss of, or damage to any goods entrusted to his care, except if such loss or damage was due to the act of God or of the public enemy. Gradually these exceptions were extended so that the common carrier was also relieved if the loss or damage was due to the act of public authority, or to the act of the shipper himself, or to the inherent nature of the goods. With these five exceptions, the common carrier has been repeatedly held to be an insurer of the goods and thus absolutely liable for any loss or damage. There is a twofold reason for this strict liability of the common carrier:

First, a common carrier has control of the goods, and he ought, therefore, to be responsible for their loss if such

loss occurs while he has possession of the goods.

Second, if no such rule existed, the common carrier might collude with third persons to deprive the shipper of his goods, and the latter party would usually be unable to prove who was the guilty party. Common carriers of today evade this common law rule to some extent by making special contracts with the shippers, exonerating themselves (the carriers) from liability for loss except for the negligence of the carrier and its agents. In some states, however, statutes have been passed which deny to common carriers the right of restricting their common law liabilities. This subject is now very largely regulated by acts of Congress and the Interstate Commerce Commission so far as roads engaged in interstate commerce are concerned.

## **EXAMPLES:**

- 1. One of the cars of the Allen Company was struck by lightning and Baker's goods were damaged as a result. The Allen Company would not be liable for such loss, inasmuch as it was caused by an act of God. Some other examples of acts of God are earthquakes, cyclones, and rain and snow storms.
- 2. A car of the Allen Company was captured by robbers, and after much of the goods were stolen, the remainder was burned. Unless the Allen Company had relieved itself from liability by special contract with Baker, it would be responsible for all loss and damage of goods in the car. Fire caused by man is not an act of God.

- 3. The United States was at war with Canada. A band of Canadians, who had invaded the United States, held up the crew of the freight train of the Allen Railroad and took all the goods out of ten cars. The Allen Company would not be held liable for this loss, for the Canadians were public enemies, inasmuch as Canada was at war with the United States. If the men who had held up this car were merely a band of rioters in the United States, the Allen Company would have been liable, unless relieved of liability by special contract.
- 4. Baker shipped live stock over the Allen Company's railroad. In order to be sure that his cattle vould be properly taken care of, Baker sent Carter along with the shipment of cattle. Carter got drunk, unmercifully beat the cattle, and badly injured them. The Allen Company would not be liable for the damage, inasmuch as a common carrier is never liable for loss caused by the act of the shipper himself, and the act of the servant, Carter, is considered to be the act of the shipper, Baker.
- 5. Baker shipped ten carloads of peaches to Florida via the Allen Company. The peaches spoiled *en route* without the fault of the Allen Company. The Allen Company would not be liable, inasmuch as the loss was due to the inherent nature of the peaches and not to the act of the railroad.
- 6. Baker, in Chicago, consigned goods to Carter, of St. Louis, over the Allen Company's Railroad. The bill of lading for the goods was sent through the mail by Baker to Carter. When the goods reached St. Louis, one Donald went to the Allen Railroad and demanded the goods, representing that he was Carter. The Allen Company delivered the goods to Donald, honestly believing that he was Carter. A few days later Carter presented his bill of lading for the goods and demanded them. The railroad company could not, of course, deliver the goods, inasmuch as they had already delivered them to Donald, believing, however, that he was Carter. Carter brought suit against the railroad company for the value of the goods. He could recover, inasmuch as the common carrier is bound to deliver the goods to the right party. In this case the Allen Company should have demanded of Donald (who represented himself to be Carter) that he produce the bill of lading, and if he could not have done so, they should either not have delivered the goods to him until they communicated with Baker, or they should have demanded that he post a bond to protect them in case that he was not the right party. Forbes v. Boston R. R., 133 Mass. 154.

7. Allen Railroad Co. made a special contract with Baker that the company was not to be liable in case the goods shipped were lost, no matter through what cause the loss occurred. The goods were lost and Baker accordingly brought suit. As has been indicated in the body of the text, in some states the carrier is permitted to exempt himself from liability by special contract. Yet even in these states where the carrier may lawfully make such contracts, he is not allowed to escape completely all responsibility from any and every loss. If, for example, the general agent of the carrier were willfully or negligently to destroy the goods, there is no question but that the carrier would be obliged to reimburse the shipper for his loss. It would be against the public policy of the land to permit such a contract of exemption to hold good. In cases, therefore, where contracts for complete exemption from all causes are made, the courts usually hold such contracts against public policy and, therefore, void, and hence Baker could recover.

The liability of a common carrier begins when the goods to be transported have been delivered to him, or to his lawful authorized agent and have been accepted for immediate transportation. The liability ends when the goods are delivered in accordance with the terms of the contract of shipment, or when the shipper regains possession of the goods.

Carriers of Passengers

§ 274. Introductory.— Inasmuch as the bailment relation deals only with goods, a carrier of passengers cannot be said to be a bailee, yet in this relation there are many points of resemblance to the bailment relation, and in the relation of common carriers of passengers toward the baggage of their passengers, we have strictly a bailment. For the sake of clearness and economy of space, it is advisable to consider under one heading the relation of common carriers of passengers toward their passengers, and the duties of common carriers of passengers toward the baggage of their passengers.

§ 275. Definitions.— A common carrier of passengers is one who represents himself as being prepared to transport from place to place, for a remuneration, any and all

persons who may apply for passage. A passenger is one who applies to a common carrier for passage and is accepted by him as such. Baggage may be said to include such articles of necessity, convenience, and comfort as in accordance with his station in life a passenger may require both for use on his journey and for immediate use at the completion of his journey. From this it will be seen that what is baggage must depend very largely on the station of life of the passenger and on the conditions of his journey. Some articles, however, such as salesmer's samples and merchandise for sale, have been held not to be baggage. In many jurisdictions this subject is regulated by statute.

# Duties of Carriers

- § 276. Liability for Injury to Passengers.— Although a common carrier of passengers is held not to be an insurer of the lives of his passengers, yet he is held to use the highest degree of skill and care to protect his passengers and he is held liable for injury due to the slightest negligence. In some States a common carrier may limit his liability by special contract, but such contracts are viewed by the courts with disfavor.
- § 277. Liability for Baggage.— Passengers have the legal right to carry a reasonable amount of baggage with them and common carriers are bound to provide for the care of the baggage of their passengers. Common carriers of passengers are responsible for the safe carriage of the baggage of their passengers and to the same extent as common carriers of goods, are responsible for the goods transported. If, however, a passenger retains possession of his baggage and fails to deliver it into the custody of the common carrier, then the responsibility of the common carrier does not exist.

# Duties of Passengers

§ 278. Must be Orderly and Must Pay.— It is the duty of passengers to be orderly; i. e., not to engage in quarrels which tend to disturb the other passengers, nor to use profane language, and it is also their duty to pay the price of

the journey on demand by the lawful representative of the company.

# **QUESTIONS**

## Bailments

I. Define the term "Bailment." From what language is the word derived?

II. Classify bailments with reference to the purpose for which the contract is created. Can you suggest any other classification of the subject?

III. Give an original illustration of each of the several

kinds of bailments.

IV. In your judgment is there really any consideration

to support a deposit or a mandate?

V. What have you to say with reference to the degrees of negligence of which a bailee may be guilty? Do you think a classification of the various kinds of care that is required of a bailee is a sound one? If not, why not?

VI. Is the bailment relation a contractual one? If so, then how can the relation be terminated? If there is a difference in this respect between the sev-

eral kinds of bailments state that fact.

VII. Allen pledged his watch with Baker, who loaned Allen fifty dollars thereon. Under the terms of their agreement Allen was to repay the loan of fifty dollars at the end of two months, at a certain place designated, and Baker was to return the watch to Allen. At the appointed time Allen tendered the money due to Baker, but Baker refused to return the watch. Has Allen any remedy or remedies against Baker, and if so, what are they?

VIII. Allen sent his automobile to the Baker Repair Shop, for repairs. Through negligence Baker destroyed Allen's machine. Has Allen any right of action

against Baker for his damage? Why?

IX. Allen delivered his automobile to the Baker Repair Shop for repairs. Baker made the necessary repairs, and then sold the machine to Carter without any authority whatever from Allen. What rights, if any, does Allen have against Baker?

X. Define the terms "inn keeper," "common carrier."

Do you think there ought to be any difference between the liability of such bailees and that of or-

dinary bailees? If so, why?

XI. Allen, a drunkard, came to Baker's inn and applied for lodging. Baker knew that Allen was a man of bad repute, and, therefore, refused to receive him as a guest. Has Baker a right of action against Allen for this refusal? State your reasons.

XII. The Allen Company were common carriers. They were transporting Baker's baggage when a hurricane swept over the country and completely wrecked the car in which Allen's baggage was located and ruined the baggage. Is the Allen Com-

pany liable for this loss? If so, why?

XIII. What is baggage? If a passenger delivers articles to a carrier, which articles are represented to be baggage but it afterwards develops that they are not such but are freight, has the carrier a right of action against the passenger for the cost of transporting such articles?

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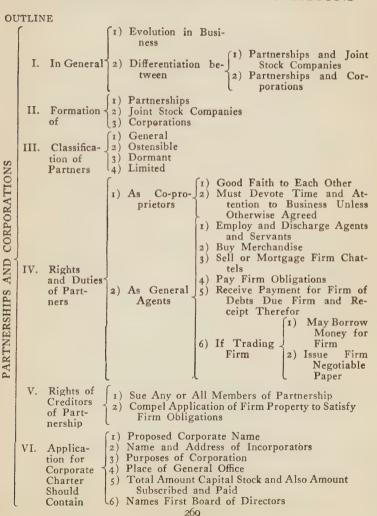
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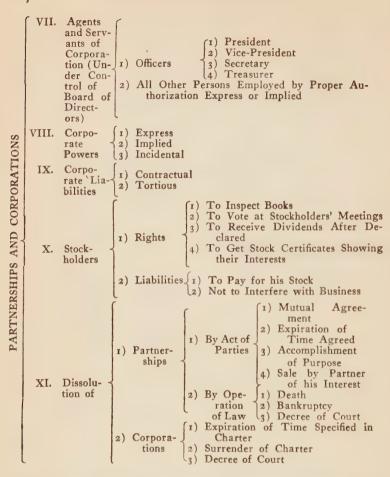
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## CHAPTER XIX

# PARTNERSHIPS AND CORPORATIONS





§ 279. The evolution of the mode of transacting business

§ 280. Differentiation between partnerships and joint-stock companies.

§ 281. Corporation defined

§ 282. Classification of corporations

§ 283. Corporations and partnerships differentiated

§ 284. Formation of partnership — who may be a partner

§ 285. Classification of partners

§ 286. Rights and duties of partners as co-proprietors

§ 287. Partners as general agents

§ 288. Rights of creditors against partners and partnerships

§ 289. Formation of corporations - who may be a stockholder

§ 290. Officers and agents of corporations

§ 291. Powers of corporations

§ 292. Corporate liabilities

§ 293. Rights of stockholders § 294. Liabilities of stockholders

§ 294. Liabilities of stockholders § 295. Dissolution of partnerships

§ 296. Dissolution of corporations

#### Forms

- § 297. Subscription to stock (before incorporation)
- § 298. Subscription to stock (after incorporation)
- § 299. General form for incorporating manufacturing and business companies in Missouri.
- § 300. By-laws of the Allen Hotel and Realty Company
- § 301. Stock certificate
- § 302. Notice of annual meeting of stockholders
- § 303. Proxy
- § 304. Meeting of stockholders
- § 305. Notice of directors' meeting
- § 306. Waiver

§ 279. The Evolution of the Mode of Transacting Business.—In the early days of our country's commercial activity, business enterprises were largely owned and conducted by individual proprietors. As the enterprises grew in importance, these proprietors employed agents and servants to aid in transacting the business. Soon it was found that two or more men could unite their capital, skill, and industry, and thus carry on business on a larger scale. This resulted in the formation of partnerships.

When the wealth and business of the country increased still more, it developed that partnerships were inadequate to satisfy commercial needs, for it was often necessary to have more capital invested in a particular enterprise than could be supplied by a limited number of individuals, and it was also found to be impractical to have too many persons of equal rank as proprietors. This gave rise to joint-stock

companies.

In order, however, to evade certain legal liability, which

attached in the case of joint-stock companies, and at the same time to gain the advantage of combining the wealth of a number of individuals in a particular enterprise, having one man or a small group of men at the head of it, corporations were formed.

§ 280. Differentiation Between Partnerships and Joint-Stock Companies.—Before we proceed to a discussion of partnerships and joint-stock companies, it is necessary that we define these terms and that we make clear some of the essential differences between them.

A partnership is a relation founded upon a contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them in lawful commerce or business, and to divide the profits and bear the losses in certain proportions.<sup>a</sup> "A contract of partnership is one by which two or more persons agree to carry on a business for their own benefit, each contributing property or services and having a common interest in the profits. It is, in effect, a contract of mutual agency, each partner acting as a principal in his own behalf and as an agent for his co-partner." b

A joint-stock company has been defined as "an unincorporated association of individuals for business purposes, resembling a partnership in many respects, but possessing a common fund or capital stock, divided into shares, which are apportioned among the members according to their respective contributions, and which are assignable by the owner without the consent of the other members." c

A joint-stock company is like a partnership in two essential respects:

- (1) Each stockholder is personally liable for all the debts of the company. If a stockholder disposes of his shares, his liability for debts up to the time of the transfer of the stock remains, but all future liability attaches to the purchaser of the stock.
  - (1) See § 283 (3).
  - (a) Cf. III Kent's Commentaries, \* 23.
  - (b) Judge Gray in Karrick v. Hannaman, 168 U. S. 334.
  - (c) Black's Law Dictionary: Joint Stock Company.

(2) Each and every member of a joint-stock company must join with the other stockholders when suit is brought in the interest of the company and must be made a party defendant when it is sought to hold the company liable.<sup>2</sup>

A joint-stock company differs from a partnership in two

chief respects:

(1) The stockholders do not all participate in the management of the firm or company, but they elect officers to

manage the business.

(2) The firm or company is not dissolved by the death or bankruptcy of a shareholder. Moreover, a shareholder may transfer his interest in the business without thereby

effecting a dissolution of the firm.

- § 281. Corporation Defined.— The word "corporation" comes from the Latin corpus, meaning "body." A corporation has been defined, in substance, as a collection of individuals united into one body, under a special name, and with power to act in many respects as an individual. Again, a corporation may be defined as an artificial person or being created by law for specific purposes, the limit of whose existence, powers, and liabilities is fixed by the act of incorporation usually called the "charter." d
- § 282. Classification of Corporations.— Corporations may be classified as public or private. A public corporation is one having for its object the administration of some branch of the powers of government delegated to it for that purpose, such as municipal corporations and county corporations. All other corporations are private. Private corporations may be further classified, but for our purpose it will be only necessary to say that the corporations which we know in the business world today are private, civil corporations.
- § 283. Corporations and Partnerships Differentiated.

   Mr. Morawetz in his work on Corporations \* has very
  - (2) This rule is sometimes changed by statute.
  - (d) Cf. Black's Law Dictionary: Corporations.
  - (e) Morawetz on Corporations, Vol. I. § 7.

clearly pointed out some of the vital differences between a private corporation and a partnership. We shall now give these distinctions with such changes and additions as are necessary for a work of this character:

- (1) While both a private corporation and a partner-ship are formed by mutual agreement of those who compose them, the partnership relation may be established by any persons, at any time, and is dependent only on the law of contract and agency, but a corporation cannot lawfully be formed without the authority of the state. It is regarded as against public policy for individuals to act as a corporation without legal authority. The privilege of corporate existence can be enjoyed only by permission from the legislative body.
- (2) At law, the members of a partnership are always treated as individuals; the partnership, as such, is usually not recognized. A corporation, on the other hand, is considered as one person and its constituent members are disregarded. The view that a private corporation is a distinct legal entity is carried to such an extent that one who holds stock in a corporation may sue the corporation.
- (3) In a partnership each member of the firm is liable for all of the partnership debts to the full extent of his possessions. In a corporation, however, unless there be special statutes attaching additional liability, a stockholder has no legal liability to pay the debts of the corporation, but he must pay into the treasury of the corporation the par value of the stock for which he subscribed.
- (4) In a partnership the delectus personalis; i. e., the choice of person, is the important consideration. A partnership is a relation of special confidence and personal trust, and for that reason a stranger cannot become a member of the firm without the consent of all the partners. In a corporation, however, there is little or no delectus personalis. The stock of the corporation is divided into a number of shares and these shares are then sold. The shareholders then get together and, by a majority vote, elect their officers to manage the business of the corporation. A shareholder

may sell his stock whenever he so desires, and the person buying the stock has a right to have his name enrolled on the books of the corporation as a stockholder, and he there-upon becomes entitled to all the rights of the stockholders.

(5) In a partnership, each and every partner is a general agent for the firm and his acts, within the scope of the business, absolutely bind his partners. In a corporation, however, quite the reverse is true. A shareholder, as such, has no right whatever to bind the corporation by his acts. Only the regularly elected directors and officers of the corporation, acting within the limits of the charter, have any power to bind the corporation by their acts.

§ 284. Formation of Partnerships; Who May be a § 284. Formation of Partnerships; Who May be a Partner.— Any person competent to make an enforceable contract may become a member of a partnership. An infant, although not capable of making an enforceable contract, may become a member of a partnership, but he may withdraw from the partnership at any time that he sees fit without incurring any legal liability therefor. If, however, the infant has invested any money or property in the partnership, he cannot withdraw such money or property, provided such withdrawal will injure creditors of the partnership.

A partnership is formed by the agreement of two or more competent persons, who join their skill, labor, or property, in a common enterprise and with a view of sharing the profits and losses. There are two essentials to constitute a partnership:

a partnership:

(1) The parties must agree to unite their property, skill, or labor, or any or all of them in a common enterprise.
(2) The parties must agree to apportion the profits in

one way or another.

A third condition is also usually provided, viz., that the parties must agree to apportion the losses, and although this is additional evidence of the formation of a partnership, yet it is not an absolutely necessary factor to test if a partner-

ship has been formed.

Much litigation has arisen over the question whether a party is a partner if he has loaned money to a partnership

enterprise and has agreed to accept repayment out of the profits of the business. Some of the courts have held that he is a partner; some have held that he is a postponed creditor, and not a partner at all; still other courts have held that he is merely a creditor on the same footing of other creditors.

§ 285. Classification of Partners.— There are several kinds of partners, such as general, ostensible, dormant and limited. A general partner is one who has voluntarily become a member of a partnership and is known to the world as such. A general partner is liable to creditors for any and all debts of the partnership.

An ostensible partner is a person who has held himself out to the world as being a partner, or who has permitted others with his knowledge to represent him as being a partner, while in fact he is not a partner. Such a person becomes liable to third persons who have extended credit to the firm, relying upon the connection of the ostensible partner's name with the firm.

A dormant partner is a person who is really a partner, but who is not generally or publicly known to be a member of the firm. Such a person, if discovered, may be held liable for any and all debts of the firm in the same manner and to the same extent as a general partner; he also has the same rights as a general partner.

A limited partner is a partner who has only a limited liability for the debts of the firm because of statutory regulations of the State wherein the partnership is formed.

§ 286. Rights and Duties of Partners as Co-Proprietors.— In a partnership each partner has a right to see that the partnership business is conducted in accordance with the terms of the contract of partnership. Each partner must exercise the highest good faith towards all the other partners. This means that he must make no secret profit and must do nothing that will place his own interest in conflict with that of the partnership.

Unless otherwise agreed by contract, each partner must devote his entire time and attention to the partnership business and must not take any other compensation than his regular share of the profits. In case, however, one of the partners wilfully neglects the partnership business and thereby throws all the burden of the business on the remaining partners, additional compensation is sometimes allowed by the courts to the partner who bore the extra burden of work.

§ 287. Partners as General Agents.— It has been previously indicated that a member of a partnership is a general agent for the firm and that, as such, he has extraordinary power. Let us now consider in detail some of the things which a partner may and may not do as a result of his general agency:

(1) He may employ and discharge agents and servants.
(2) He may buy such merchandise for the firm as, in his judgment, is needed. If, however, a partner orders merchandise on the credit of the firm which is ostensibly for the firm but is actually for his private use, the vendor cannot hold the firm liable for the property, unless it was property of such a character as was ordinarily used in the partnership business, or as would ordinarily be used in a business of like character. The reason on which this rule is based is that a general agent may bind his principal (in this case, all the partners of the partnership) only by such acts as are within the apparent scope of his authority.

(3) He may sell or mortgage any of the chattels of the firm.

(4) He may receive payment of all obligations due the firm and may receipt therefor.

(5) He may make, endorse, or receive negotiable papers in the name of the firm, if it is a trading partnership; i. e., one engaged in exchanging, or buying and selling commodities, but not for a non-trading partnership, i. e., one not engaged in trade, such as a firm of physicians or of lawyers.

(6) He may borrow money on the credit of the firm, if a trading firm, and if he was apparently doing so for the purposes of the firm, but if the party from whom he is

borrowing knows that it is not for such purposes, such party cannot hold the firm liable for the debt.

(7) He may not assign the entire property of the firm, unless the other partners consent to such an assignment.

- (8) He may not buy or sell any real estate without the consent of his partners, unless it is a partnership engaged in the real estate business.
- § 288. Rights of Creditors Against Partners and Partnerships.— When a creditor desires to enforce liability against a partnership, he should bring the action against all the members of the firm, but if he obtains a judgment, he may then proceed to satisfy his judgment out of the individual property of any one partner. If, however, one partner is made to pay an entire debt of the firm, he may compel the other partners to bear their proportionate part of the debt.

If a party who is a partner wishes to leave the partnership, and with the consent of the other partners, sells out his interest in the firm, then such retiring partner ceases to be liable for all future debts of the partnership, but he remains liable for all past indebtedness.

It often happens that a party, who is a member of a partnership, has two sets of creditors; to one set he owes money as an individual, and to the other set he is indebted as a member of the partnership. A very interesting problem then arises as to which of these classes of creditors shall have precedence in case the debtor cannot meet his obligations in full. The weight of authority now seems to be as follows:

(1) Creditors of the firm have a right to demand that property of the firm be first applied to the payment of partnership debts. If there is a surplus after satisfying partnership creditors, then the partner's share in the surplus shall be subject to levy to pay his private obligations.

(2) On the other hand, it is usually held that individual creditors have a right to have the private property of the

partner applied first to the payment of individual debts.

If there is a surplus, however, this surplus shall be applied

to the payment of partnership debts.

§ 289. Formation of Corporations: Who May be a Stockholder.— It has been seen that a partnership may be formed by a voluntary contract between a number of persons, and that a corporation requires one additional element, viz., the consent of the State, or as it is sometimes otherwise stated, the sanction of the law. Almost all of the States of the Union have general laws by which individuals may organize corporations by complying with certain formalities. By the common law, however, it was necessary to get a special grant from the State in order to form a corporation. Such a grant was called its "charter." and although the special grants of the common law no longer prevail, the articles of agreement plus the certificate of incorporation are called the "charter" of the corpora-The persons who hold stock in the corporation are called the stockholders, or the shareholders.

Just before the charter of the corporation is applied for, the stockholders elect a Board of Directors, who ordinarily are to govern and direct the affairs of the corporation for one year after the charter of the corporation is received. The Directors in turn elect the officers of the corporation, such as the President, Vice-President, Secretary, and Treasurer. The petition or so-called articles of agreement which persons who wish to incorporate send to the Secretary of State should contain the following facts: first, the proposed name of the corporation; second, the full name and address of the incorporators; third, the purpose for which the corporation had been formed; fourth, the place where the general office of the corporation is to be located and where business is to be carried on; fifth, the total amount of capital

names of the first Board of Directors.

Any person may become a stockholder in a corporation except one who has been declared by a court having jurisdiction as being incompetent and for whom a guardian has

stock, and the amount already subscribed for; and sixth, the

been appointed. If an infant, however, makes a promise to take and pay for stock in a corporation, he may avoid his promise. So, too, if an infant purchases stock from an adult, the infant may later rescind the contract and recover his money. It has been held, however, that if an infant takes stock in a corporation and pays for it, and later on wishes to withdraw from the corporation, then although he may withdraw in person, yet he may not withdraw the money or property invested, if such withdrawal would injure the existing creditors of the corporation.

§ 290. Officers and Agents of Corporations.— It has been previously indicated that officers of a corporation are elected by the directors of the corporation. The method of procedure to be followed in the election of officers is provided for in the By-Laws of the corporation. The general duties of the various officers are also provided for in

the By-Laws.

The principal officers of a corporation are the President, Vice-President, Secretary and Treasurer. In corporations of any size the elective officers in turn appoint agents to assist in carrying on the work of the corporation. The only persons who have authority to act for the corporation are the regular officers and such persons as are appointed by the regular officers in accordance with the power vested in such officers in the By-Laws of the corporation. The stockholders of a corporation, as such unlike the members of a partnership, have no authority whatever to act as agents for the corporation.

§ 291. Powers of Corporations.— A corporation owes its existence and derives its power from the act of the legislature creating it. In a partnership, if the members desire to engage in a new enterprise, other than was originally contemplated in entering the partnership, they may do so by mutual agreement. But, the officers of a corporation have no such power to enter into enterprises other than those originally intended. The charter is the measure of

the corporation's power.

The corporation has, first, those powers expressly con-

ferred by the charter, second, those powers impliedly conferred, and third, those powers incidental to every corporation. The express powers are those which specifically conferred in the charter. The implied powers are those powers which are necessarily an outgrowth of the express powers. For example, a corporation created for commercial purposes would necessarily have power to buy and sell merchandise, to make contracts for purposes of trade and to sign and receive negotiable paper in the course of trade. The incidental powers are those which every corporation possesses. The incidental powers may be enumerated as follows:

(1) To have a corporate name.

(2) To have a corporate seal.
(3) To sue and be sued in the corporate name.

(4) To make By-Laws providing for the election of officers, the duties of officers, the transfer of stock, the management of the business in general, etc.

(5) To appoint officers, agents and servants to carry

on the business.

§ 292. Corporate Liabilities.— When we come to the liabilities of a corporation, we enter a very large field. general, the liabilities may be divided into two classes: first, contractual, and second, tortious.

A corporation is liable for all contracts made by its agents acting within the apparent scope of their authority. It is often very difficult to determine just what contracts are within the apparent scope of authority. As has been previously indicated, the charter is the measure of the corporation's power. The public is for reasons of legal policy conclusively presumed to know the powers of every corporation, although, of course, as a matter of fact, these powers are rarely if ever known by the public.3 Inasmuch as the presumption of knowledge exists, it has been re-

(3) The articles of agreement of all corporations are on record with the Secretary of State and usually also with the county offices in which the corporation has its home office, and are open for inspection by any member of the public who has a legitimate reason to see them.

peatedly held that if an act of an agent is not within the powers expressly or impliedly conferred in the charter of the corporation, then such act is not within the apparent scope of the agent's authority and is, therefore, not binding on the corporation. Such acts are called *ultra vires*, meaning beyond the powers conferred. There have been many decisions, however, which have held that if a corporation has received the benefits of an *ultra vires* contract, it is then liable for such benefits. The limits of this work prevent a detailed consideration of this complicated subject.

A corporation is liable for all the torts of its agents and servants committed in the course of their work.

§ 293. Rights of Stockholders.— Although stockholders, as such, have no legal authority to bind a corporation by their acts, yet they do have certain rights in the corporation. Some of these rights are as follows:

(1) To inspect the books of the corporation for legiti-

mate purposes.

(2) To vote at stockholders' meetings, if the holders of voting stock.

(3) To receive dividends, if same have been declared

by the Board of Directors.

(4) To have issued to them stock certificates, repre-

senting the interest they hold in the corporation.

- § 294. Liabilities of Stockholders.— Unless there are special statutes covering the subject, a stockholder of a corporation is not individually liable to a creditor of the corporation. But if a stockholder has not paid in full for the stock for which he has subscribed, he may be compelled to do so. This refers to stock not paid for when issued. If stock is fully paid to the corporation and then is sold by a stockholder to some other party, the law has no concern as to how much or how little is paid to the vendor by the vendee.
  - § 295. Dissolution of Partnerships.— By dissolution of
- (f) See A. B. Frey on Ultra Vires: American Law Review, Vol. 43, p. 81.

a partnership is meant the breaking of the bonds of the firm,— the termination of the partnership relation. This may occur in any one of the following ways:

(1) The partners may mutually agree to dissolve the

partnership.

(2) The time for which the partnership contract was made, provided any time was stipulated, may expire and thus eo ipso bring the business to a termination.

(3) The death or bankruptcy of a partner will work a dissolution of the firm, unless it is otherwise agreed in the

partnership contract.

(4) The bankruptcy of the partnership itself will work a dissolution of the firm.

(5) The sale by a partner of his interest in the firm will dissolve the partnership. The other partners may, however, immediately form a new partnership with the per-

son who purchased the outgoing partner's interest.

(6) A court may decree a dissolution of a partnership upon the request of one or more partners on the grounds that a loss in business is occurring, or that the other partners are acting dishonestly, or are growing careless, or that they have become insane.

Upon the dissolution of a partnership, the members of the firm should immediately notify persons from whom they have purchased merchandise to that effect. As an additional precaution they should also publish a notice of the dissolution in a daily or weekly newspaper in the city or locality where the partnership business has been conducted.

§ 296. Dissolution of Corporations.— A corporation is

dissolved in one of three ways:

(1) The time for which the corporation was created

may have expired.

(2) The members of the corporation may surrender their charter to the State and the State may accept such surrender.

(3) A court having jurisdiction may decree a dissolution of the corporation because of the insolvency or bankruptcy of the corporation, or because of a violation of the law of the State, or because of the violation of the powers

granted the corporation in the charter.

Upon the dissolution of a corporation, the assets are used to pay the obligations of the corporation, and the balance is then ratably divided among the stockholders of the corporation.

## Forms

# § 297. Subscription to Stock Before Incorporation.—

We, the undersigned, for the purpose of organizing a corporation under the laws of the State of \_\_\_\_\_\_, and more particularly under the laws governing manufacturing and business corporations, for the purpose of manufacturing paint with an authorized capital stock of one hundred shares of the par value of one hundred dollars per share, such corporation to be known as Allen & Baker Company (or by such other name as may be designated in the Articles of Association) hereby agree, each in consideration of the other subscriptions hereto, and each separately for himself, and not for any other, to pay the amount below, or upon copies hereof, set opposite our respective names, to Robert Baker, chairman, Committee on Finance, in the manner and upon the conditions following, to-wit:

First.— Fifty per cent of the amount of said subscriptions shall be payable upon demand of said Robert Baker, Chairman, which sum may be called in such amounts as may required by said Committee on Finance, and used in its discretion for preliminary expenses incurred or to be incurred in the organization of such corporation and promoting the enterprise for which it is to be formed, and the remaining fifty per cent thereof shall be payable upon the call of the said Committee on Finance of the aforesaid corporation, at the time that the Articles of Association are drawn up for filing, so that the Board of Directors as named in said Articles of Association may have one hundred per

cent of the subscriptions paid up and in their hands, when fully organized.4

Second.— These subscriptions shall not become binding until the full amount of Ten Thousand Dollars, the full capitalization of the corporation, shall have been subscribed.g

§ 298. Subscription to Stock After Incorporation.— I hereby subscribe for ten shares of the par value of one hundred dollars each in the Allen Company, a corporation organized under the laws of the State of \_\_\_\_ with an authorized capital of ten thousand dollars, the said shares to be issued as full-paid and non-assessable, for which I agree to pay five hundred dollars on the first day of September, 1914, and five hundred dollars on the first day of February, 1915.

Certificate to be issued when the first payment is made and to be made out in the name of and delivered to Robert Baker, City (or Town) of \_\_\_\_\_\_, State of \_\_\_\_\_.

Dated at the City (or Town) of \_\_\_\_\_, State of

this first day of June, 1914.h

RICHARD BAKER.

§ 299. General Form for Incorporating Manufacturing and Business Companies in Missouri.—

## KNOW ALL MEN BY THESE PRESENTS:

That we, the undersigned, desirous of forming a corporation under the laws of Missouri, and more particularly under the provisions of article —, R. S. of Missouri, and amendments thereto, governing manufacturing and business companies, have entered into the following agreement:

- (4) This is a general form but the statutes of the several states must be consulted and a due compliance must be had therewith. In some states all of the capital stock must be subscribed while in others this is not necessary.
  - Sears on Corporations in Missouri, p. 321. (g)
  - (h) Sears on Corporations in Missouri, p. 322.

First: That the name of the corporation shall be . (Name designating the business contemplated; but not the name of any corporation existing under the laws of this State for similar purposes. When the name of a person or firm is assumed it should be joined with some word or words designating the business to be carried on, followed by the words "company" or "corporation.") Second: That the corporation shall be located in the

, — County, — .

Third: That the amount of capital stock is ——— (not less than nor more than \$\_\_\_\_\_), divided into \_\_\_\_\_ shares of the par value of \_\_\_\_\_ dollars each; that — thereof has been in good faith subscribed, and — actually paid up in lawful money of the United States and is in the custody of the persons named as the first Board of Directors or managers.

Note: If property be real estate give exact description by metes and bounds, location of same and actual cash value of each tract. If personal property, itemization must give location of each class of personal property and the actual cash value of each class. If paid in both money and property, state facts, giving amount of cash and amount of property, with description, location and value of property.

Fourth: That the names (not less than three), places of residence of the shareholders, and the number of shares subscribed by each are:

Name Residence No. of Shares

Fifth: That the Board of Directors shall consist of shareholders, and the names of those agreed on

for the first year are ———, ———, ———.
Sixth: That the corporation shall continue for a term of — years.

Seventh: That the corporation is formed for the following purposes:

(Here set out purposes.)

IN TESTIMONY WHEREOF, we have hereunto set our hands this ————————————————————————————————————
•
STATE OF CITY OF SS.
On this day of, 19, before me personally appeared (names of all the stockhold ers), to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.  IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year last above men-
tioned. My commission expires ———, 19 ——.
(Seal)
Notary Public.
STATE OF CITY OF Ss.
The undersigned, ————————————————————————————————————
that the statements and matters set forth therein are true; that they know the property described in Article 3 of said articles of agreement and taken in payment of capital stock, and that the value placed on same is the actual cash value of said property.
Subscribed and sworn to before me this day of, A. D. 19 My commission expires, 19
Notary Public.

§ 300. By-Laws of the Allen Hotel and Realty Company, St. Louis, Missouri.—

# **BY-LAWS**

I. The principal office shall be at St. Louis, Missouri. The corporation may also have offices at such other places as the Board of Directors may from time to time appoint or the business of the corporation may require.

2. The corporation shall have a seal, and inscribed thereon shall be the name of the corporation and "St. Louis, Missouri," and the word "SEAL," as per impression made

on this By-Law.

3. All meetings of the stockholders shall be held in the State of Missouri, and at the office of the corporation in

the City of St. Louis.

4. The annual meeting of the stockholders, after the year 1914, shall be on the second day of January, in each year, unless said day is a legal holiday, and if it is a legal holiday, then on the day following, at nine o'clock A. M., when the stockholders shall elect by a plurality vote, by ballot, a Board of Directors, to serve for one year, or until their successors are elected and qualify.

5. The holders of a majority of the stock issued and outstanding, present in person, or represented by proxy, shall be requisite and shall constitute a quorum at all meetings of the stockholders for the transaction of business except as otherwise provided by law, by the certificate of

incorporation or by these By-Laws.

6. At each meeting of the stockholders, every stockholder shall be entitled to vote in person or by proxy, appointed by an instrument in writing subscribed by such stockholder or by his duly authorized attorney, and he shall have one vote for each share of stock registered in his name at the time of the closing of the transfer books for said meeting.

7. Written notices of the annual meeting shall be mailed to each stockholder as required by the statutes of the State

of Missouri, unless such stockholders waive their rights to such notices.

8. Special meetings of the stockholders, for any purpose or purposes other than those regulated by statute, may be called by the President, and shall be called by the President or Secretary at the request in writing of a majority of the Board of Directors, or at the request in writing by stockholders owning a majority in amount of the entire capital stock of the corporation issued and outstanding. Such request shall state the purpose or purposes of the proposed meeting. Written notices of such meeting shall be mailed, postage prepaid, to each stockholder at least ten days prior to the calling of such special meeting.

9. The property and business of this corporation shall be managed by its Board of Directors, three in number. They shall be elected by the stockholders, at the annual meeting of stockholders of the corporation, and each director shall be elected to serve for the term of one year, and

until his successor shall be elected and shall qualify.

10. The directors of said corporation shall have full powers and authority to do any and all acts not inconsistent with the purposes for which said corporation was formed, and not contrary to the laws of the State of Missouri.

11. Special meetings of the board may be called by the President on ten days' notice to each director, either personally or by mail or by telegram; special meetings shall be called by the President or Secretary in like manner and on like notice on the written request of a majority of the directors.

12. The officers of the corporation shall be a President, a Vice-President, a Secretary and a Treasurer. Any two of the aforesaid offices may be filled by the same person, except that the President and Vice-President shall not be the same person.

13. The Board of Directors, at their meeting immediately after each annual meeting of the stockholders shall elect, by ballot, a President and Vice-President from their own number, and the board shall also annually choose a

Secretary and a Treasurer who need not be members of the board, and a majority of the whole number of directors shall be necessary for the election of each of said officers.

14. The board may appoint such other officers and agents as it shall deem necessary, who shall have such authority and perform such duties as from time to time shall be prescribed by the board.

15. The salaries of all officers and agents of the cor-

poration shall be fixed by the Board of Directors.

16. The officers of the corporation shall hold office for one year, and until their successors are chosen and qualify in their stead. Any officer appointed by the Board of Directors may be removed at any time by the affirmative vote of a majority of the whole Board of Directors.

17. The President of the corporation shall be the chief executive officer thereof, and he shall preside at all meetings of the stockholders and directors, and he shall have full and complete management of the business of the corporation. He shall execute all documents requiring a seal, under the seal of the corporation.

18. The Vice-President shall act only in the absence from the city, serious illness, or permanent disability of the

President.

19. The Secretary shall attend all meetings of the stockholders, keep the seal of the corporation, and perform such other duties as are incidental or usual to the office of Secretary.

20. The Treasurer shall have the custody of the corporate funds, and shall disburse such funds in accordance

with the directions of the Board of Directors.

- 21. In case of the absence of any officer of the corporation, or for any other reason that the board may deem sufficient, the board may delegate the powers or duties of such officer to any other officer, or to any director, for the time being, provided a majority of the entire board concur therein.
  - 22. Transfers of stock shall be made on the books of

the corporation only by the person named in the certificate or by attorney, lawfully constituted in writing, and upon surrender of such certificate.

23. The Board of Directors may close the transfer books in their discretion for a period not exceeding thirty days preceding any meeting of the stockholders, annual or special, or the day appointed for the payment of a dividend.

24. The corporation shall be entitled to treat the holder of record of any share or shares of stock as the holder in fact thereof and accordingly shall not be bound to recognize any equitable or other claim to or interest in such share on the part of any other person whether or not it shall have express or other notice thereof, save as expressly provided by the laws of Missouri.

25. The directors shall determine from time to time whether, and, if allowed, when and under what conditions and regulations the accounts and books of the corporation (except such as may be by statute specifically open to inspection) or any of them shall be open to the inspection of the stockholders, and the stockholders' rights in this respect are and shall be restricted and limited accordingly.

26. All obligations of the company shall be signed by the company's name, per the name and office of the officer executing the same. No officer or agent of this company shall execute any check or contract or incur any indebtedness except by resolution of the Board of Directors, duly passed, and except as herein expressly prescribed and provided for.

27. The fiscal year of the corporation for the first year shall terminate on the thirty-first day of December, 1914, and every year thereafter shall begin on the first day of January, and terminate on the thirty-first day of December.

<sup>(</sup>i) Sears on Corporations in Missouri, p. 338.

# § 301. Stock Certificate.—

# Incorporated Under the Laws of the State of Missouri

Number 4

Par Value \$100 Per Share

Shares

# ALLEN HOTEL AND REALTY COMPANY

Capital Stock, \$10,000.00 Fully Paid

THIS CERTIFIES THAT Richard Baker is the owner of one share of the Capital Stock of

# ALLEN HOTEL AND REALTY COMPANY

Transferable only on the Books of the Corporation in per-

son or by Attorney on surrender of this Certificate.

IN WITNESS WHEREOF, the duly authorized officers of this Corporation have hereunto subscribed their names and caused the Corporate Seal to be hereto affixed at St. Louis, this first day of June, A. D. 1914.

(SEAL)

JOHN ALLEN,
President.
THOMAS CARTER,
Secretary.

# On Reverse Side of Certificate

For value received — hereby sell, transfer and assign to — Share of Stock within mentioned and hereby authorize to make the necessary transfer on the Books of the Corporation.

WITNESS — hand and seal this — day of

\_\_\_\_\_, 1914.

RICHARD BAKER.

# Witnessed by:

§ 302. Notice of Annual Meeting of Stockholders.— The annual meeting of the stockholders of the John Allen Company for the election of directors, to serve during the ensuing year, and for the transaction of such other business as may properly come before the meeting, will be held at the office of the company, 408 Locust Street, City of St. Louis, State of Missouri, on the first day of June, 1914, at nine o'clock A. M.<sup>1</sup>

JOHN ALLEN, President.

Attest: Richard Baker, Secretary.

St. Louis, Missouri, May 29th, 1914.

§ 303. Proxy.—

KNOW ALL MEN BY THESE PRESENTS, That I, John Allen, of the City of St. Louis, and State of Missouri, do hereby appoint Richard Baker of the City of St. Louis, Missouri, to be my substitute and proxy for me and in my name and behalf to vote at annual election for officers of the Allen Company, and at the annual meeting of the stockholders of said Allen Company as fully as I might or could were I personally present.

IN WITNESS WHEREOF, I have hereunto set my hand

and seal this first day of June, A. D. 1914.

JOHN ALLEN.

§ 304. Meeting of the Stockholders.—

Meeting of the stockholders of the John Allen Company called this first day of June, 1914, there being present of represented by written proxies all of the shares of stock owned in said corporation.

At said meeting of said corporation the following busi-

ness was discussed: 5

(Here set out the business.)

No further business appearing the meeting duly adjourned.

JOHN ALLEN, Chairman.

<sup>(5)</sup> The minutes of the stockholders and of the directors should state what took place clearly and without variation; giving the names where possible of those who make all motions and the result of the vote.

<sup>(</sup>j) Sears on Corporations in Missouri, p. 46.

§ 305. Notice of Directors' Meeting .-

June 1st, 1914.

To Richard Baker, Director of the Allen Company:

You are hereby given ten days' notice in writing that there will be a meeting of the Board of Directors of the John Allen Company on June 11th, 1914, at 10 o'clock A. M. at the office of said company at 410 St. Charles Street in the City of St. Louis, Missouri. At this meeting important business will be discussed and you are therefore urged to be present.

JOHN ALLEN, President.

THOMAS CARTER, Secretary.

§ 306. Waiver .--

We, the undersigned, being all of the Directors of the John Allen Company, hereby waive notice of the special meeting of the Directors of said Company held this said 11th day of June, 1914, and we hereby evidence said waiver by our signatures to this instrument and to the minutes of the meeting of said Board of Directors.

JOHN ALLEN,
RICHARD BAKER,
THOMAS CARTER,
Directors.

# **QUESTIONS**

I. Are all corporations to be condemned?

II. Which do you believe is the more convenient method of transacting business — through a partnership or corporation? Why?

III. Are there any disadvantages to the corporate method of transacting business and enterprises,

and if so, what are those disadvantages?

IV. Define the terms "joint-stock company," and "partnership."

V. Allen, Baker and Carter joined their property and

money together in the formation of a partnership under the name of Allen & Carter. Baker's name did not appear in the firm name. Baker took no part in the active management of business of the firm. Allen & Carter were unsuccessful in carrying on the business of the firm, and they incurred large firm obligations. Donald, a creditor of the firm, learned that Baker was interested. He thereupon brought suit against Allen, Baker and Carter to recover the money which he alleged was due him. Can he recover from any of them, or from all of them? Give reasons. To what class of partners does Baker belong?

VI. May a partnership be sued as such or must the individual members of the firm be sued? May a corporation be sued as such, or must the indi-

vidual stockholders be sued?

VII. How is a corporation formed?

VIII. The charter of the Allen Company, a corporation, said nothing about the appointment of agents for the corporation. After the company was organized, its President appointed an agent to sell the products of the company. Was the President acting unlawfully in so doing? If he was acting lawfully then how would you classify the powers he was exercising?

IX. The Allen corporation had one hundred shares of capital stock. Of this Allen owned ninety-eight shares, Baker one share and Carter one share. Allen died. Did this dissolve the corporation?

X. Allen, Baker and Carter were partners, each owning one-third of the partnership property. Allen died. Did this dissolve the partnership? Why?

XI. Baker, a stockholder in the Allen corporation, when walking one day on a public highway was run over and injured by an automobile belonging to the corporation and driven by a servant of the corporation. Baker desires to bring an action at

law against the corporation for his injuries. May he do so? Give reasons for your answer.

XII. Allen, Baker and Carter were partners in conducting an automobile factory. Allen in going through the factory was struck through the negligence of one of the workmen and was seriously injured. May he sue the firm for his injuries?

Give reasons for your answer.

XIII. Allen and Baker were co-partners, doing a general merchandise business. They contracted a great many debts. Allen also contracted many debts individually. Both the partnership and Allen were insolvent. In your judgment what would be the method of paying the debts of the partnership and of the individuals? What do you think is a fair method?

#### REFERENCES

F. M. Burdick on Partnership (Little, Brown & Co., Boston)

W. F. Wharton's Story on Law of Partnership

(Little, Brown & Co., Boston)

J. Parson on Exposition of the Principles of Partnership

(Little, Brown & Co., Boston)

V. Morawetz on the Law of Private Corporations (Little, Brown & Co., Boston)

J. W. Thompson's Thompson on Law of Private Corporations

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W. W. Cook on Law of Corporations

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John H. Sears on Business and Manufacturing Corporations

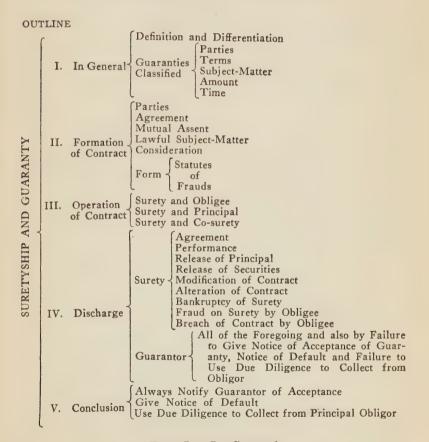
(Counselors Publishing Company, St. Louis)

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(The Bowen-Merrill Company, Indianapolis)

### CHAPTER XX

### SURETYSHIP AND GUARANTY



# Part I - In General

§ 307. Definitions and Differentiation

§ 308. Guaranties Classified

#### Part II - Formation of Contract

§ 309. Essentials of Contract of Suretyship

# Part III - Operation of the Contract

§ 310. Surety and Obligee

§ 311. Surety and Principal

§ 312. Surety and Co-Surety

# Part IV - Discharge

§ 313. How Discharged

Part V — Conclusion

§ 314. Suggestions

T

#### In General

§ 307. Definitions and Differentiation.— One who has agreed to perform any lawful duty or obligation, for example, to pay money or to do certain work, is called an obligor. If the duty or obligation is the undertaking of the obligor himself, then he is the principal obligor, and is said to be primarily liable. When one becomes an obligor, however, not for the performance of his own undertaking, but solely to be responsible or answerable for the performance of an obligation of some other person, then he is said to be secondarily liable. The one to whom a duty or obligation is due is called an obligee.

It is with contractual liability incurred by persons secondarily liable that the subject of suretyship and guaranty is concerned. A surety has been defined as one who agrees to answer for the debt or default of another. Perhaps it would be more accurate to say that a surety is one who, usually in the same undertaking or contract as that of a principal obligor, agrees to be jointly liable with such principal to the obligee in the contract, in case of default by such principal. A guarantor is one who in a contract or undertaking, ordinarily independent of the contract of the principality independent o

pal obligor, engages or agrees to be responsible to the obligee of the principal, if such principal defaults in the per-

formance of his obligation.

In both Suretyship and Guaranty there are three persons involved: the principal obligor, the obligee of the principal and the third person who engages to be liable upon default. The surety is ordinarily a party to the contract or undertaking of the principal obligor, while a guarantor usually makes an independent contract with the obligee. In case of default since the surety is a party to the original contract, unless it is otherwise provided in the contract, he can be sued and jointly held with the principal; while a guarantor who is not such a party to the original contract must be sued in an independent action. Again, it may be said that the surety is one who engages to pay or perform if the principal obligor fails to do so, while a guarantor is one who engages to pay or perform if the principal cannot be made to do so.

The position of an indorser of a negotiable instrument is somewhat like that of a surety. The indorser can be held liable in case the party primarily liable on the instrument defaults in payment. The law relating to indorsers will be outlined in the Chapter on Negotiable Instruments, so it is unnecessary to repeat the discussion here.

#### **EXAMPLES:**

1. Baker wishes to buy of Allen one hundred pianos at \$500 per piano, making a total of \$50,000. Allen is unwilling to sell these pianos to Baker unless Carter becomes a surety on the contract.

Accordingly, they enter into the following contract:

Allen this day sells to Baker, and Baker this day buys of Allen one hundred Cleopatra pianos at \$500 per piano, f. o. b. St. Louis for immediate delivery. In consideration of the said sale Baker agrees that he will pay said Allen \$50,000 thirty days from the date hereof, and in consideration of said credit being so extended by Allen to Baker, Carter, the undersigned, agrees that if Baker does not pay the said sum promptly when due then he, the said Carter, will pay said sum to said Allen.

Here Allen is the obligee, Baker is the principal obligor, or the

one primarily liable, and Carter is the surety or the one secondarily liable. Cf. Smith v. Shelden, 35 Mich. 42.

2. Baker wishes to go into business but he has no credit standing. He gets his friend, Carter, to give him a letter addressed to Allen

Company as follows:

"If you will extend credit to Baker, of St. Louis, who wishes to buy merchandise of you between April 5th and April 10th, 1919, not to exceed in amount a total of \$1,000 this will be your guaranty from me to secure you in the payment of said account in the event that Baker does not pay the same when due."

Here there is a separate contract between the Allen Company and Carter. If the Allen Company wishes to enter into said agreement it should notify Carter of its acceptance thereof; likewise if Baker does not pay at maturity the Allen Company should promptly notify Carter of the failure of Baker to pay, and the Allen Company should use due diligence to collect the amount due from Baker.

# § 308. Guaranties Classified.— Guaranties may be classified as follows:

As to Parties

{
General
Special
As to Terms
{
Absolute
Conditional
For Payment
For Collection
As to Amount
{
Continuing
Continuing
Temporary
}

A general guaranty is a guaranty that is addressed to the world at large and not to a particular person; while a special guaranty is one to a particular person, or persons. An absolute guaranty is one to which no conditions are attached, while a conditional guaranty is one in which the guarantor agrees to become liable only upon the fulfillment of the conditions specified. A guaranty for payment is a guaranty to pay the bill at a specified time; while a guaranty for collection is one in which the guarantor agrees that if due diligence is used by the obligee and the principal obligor is not

made to pay, then he, the guarantor, will pay the same. An unlimited guaranty is one in which no particular limit is specified on the amount of credit to be extended, while a limited guaranty is one in which the amount of credit to be advanced is confined to certain amounts. A continuing guaranty is one which is to go on for an indefinite period, while a temporary guarantee is one which is limited to a certain transaction, or a certain series of transactions.

#### **EXAMPLES:**

I. To Whom it May Concern:

I, Carter, guarantee the payment of all the merchandise purchased by Baker.

CARTER.

This guaranty is general, absolute, for payment, unlimited and continuing.

2. To the Allen Company:

On condition that you notify me of the acceptance of this guaranty, and that you also notify me in the event of default hereunder by Baker, I, Carter, guarantee for collection your account against Baker for a sum not to exceed \$2,000, for merchandise purchased during the months of April and May, 1919.

This guaranty is special, conditional, for collection, limited as to

amount, and temporary as to time.

From the foregoing two illustrations it will be seen that a guaranty may fall within a number of the various classes at the same time. A contract of suretyship is not classified as are contracts of guaranty for the reason that ordinarily the surety is bound to some special person for a limited amount or obligation and for a particular time. Contracts of suretyship may be subject to any conditions that the parties see fit to agree upon and may be for purposes as are specified.

II

#### Formation of Contract

§ 309. Essentials of Contract of Suretyship.— The same principles apply to the formation of a contract of

suretyship or guaranty as to any other contract. There must be competent parties, an agreement, mutual assent, a sufficient consideration, a lawful subject-matter, and the contract must be evidenced in the form required by law.

With reference to the parties all that need be said is that even though the principal obligor is not liable because of his incapacity, still the surety or the guarantor may remain responsible. As to agreement, mutual assent or lawful subject-matter, nothing need be said, for the same rules apply as have been given under those topics in the chapters on Contracts. A sufficient consideration is always necessary to support a contract of suretyship or a guaranty just as in any other valid contract. Ordinarily the consideration which binds the surety or guarantor is the detriment suffered by the obligee in parting with something of value to the principal obligor on reliance of the agreement of the surety or the guarantor. In other words, it is the detriment suffered by the promisee, who is the obligee in the contract, rather than the benefit gained by the promissor, who is the surety or the guarantor, which supports the contract.

#### **EXAMPLES:**

1. Baker, an infant, entered into a contract with Allen for which contract Carter was surety for Baker. Baker refused to carry out his contract. This would not release Carter from liability, who would be answerable to Allen for the default of Baker.

2. Baker and Allen conspired together to cheat Carter. Accordingly Baker induced Carter to sign a contract guaranteeing payment of a sum of money which both Baker and Allen falsely represented to Carter that Allen was lending to Baker. Then Baker refused to pay the money, whereupon Allen made demand on Carter for payment. On Carter's refusal to pay Allen filed suit against him. He cannot recover for there was a fraudulent misrepresentation and the contract lacked reality of consent, also consideration.

3. Baker owed Allen ten thousand dollars. The debt fell due January 2nd, 1920. Baker could not pay so he asked Allen to extend the time of payment to March 2nd, 1920, which Allen agreed to do, provided Carter guaranteed the payment of the account at maturity. This was a contract of guaranty and was valid. The consideration was the extension of time for a definite period.

Under the fourth section of the Statute of Frauds, in order to hold a person liable upon any special promise made to answer for the debt, default, or miscarriage of another, it is necessary that such agreement or promise be in writing signed by the party to be charged, or his agent thereunto lawfully authorized. This section of the Statute of Frauds covers contracts of suretyship and guaranty, and accordingly such contract must be in writing in order to be able to hold the surety or the guarantor.<sup>1</sup>

If there are only two persons to a contract, and not three, then it is not a contract of suretyship or guaranty, but it is then a direct obligation of the one with whom the contract

is made.2

#### **EXAMPLES:**

1. Baker owed Allen one thousand dollars. Carter said to Allen: "Release Baker from his debt to you and charge the same to me." This, Allen agreed to do and did. This was not a contract of surety or guaranty. Upon the release of Baker the contract became a direct obligation of Carter to Allen. Cf. Curtis v. Brown, 5 Cush. 488.

2. Baker ran his automobile over Allen, who thereby brought suit for damages. Baker agreed to pay Allen two thousand dollars sixty days after date if he would execute a release exonerating him, Baker, from all liability. This Allen agreed to do if Carter would guarantee the payment of the amount by Baker. This contract is a contract of guaranty in which Carter agreed to answer for the default or miscarriage of Baker and hence it must be in writing.

3. Carter went to Allen and said, "Allen, send twenty-five desks to Baker and charge them to me." This is not a contract of surety-ship because Carter is primarily liable to Allen since he directed that a charge be made direct to himself.

4. Baker owed Allen \$1,000 for merchandise purchased. Allen demanded his money of Baker and threatened to sue if payment was

(r) It is well understood that such contracts are not void for the lack of a sufficient writing. They are merely unenforceable in a court of law if the defendant chooses to offer the statute as a defense. Philbrock v. Belknap, 6 Vt. 383.

(2) When the party to be charged is beneficially interested in the consideration, then his promise is original and need not be in writing. Davis v. Patrick, 141 U. S. 479.

not made. Accordingly Baker got his friend, Carter, to agree with Allen to release Baker from all liability, and to accept Carter as the one liable for the debt. This is not a contract of suretyship or guaranty, but the direct obligation of Carter to Allen, and accordingly the contract need not be in writing. Cf. Watson v. Jacobs, 29 Vt. 169.

#### III

# Operation of the Contract

§ 310. Surety and Obligee.— An obligee is entitled to have the surety pay the obligation upon default of the principal obligor; likewise to have the guarantor subject to the conditions of the guaranty pay the obligation if the principal obligor cannot be made to do so. The surety or guarantor, in turn, upon payment of the obligation is entitled to receive from the creditor, or obligee, any property or securities of value belonging to the principal obligor which the obligee had been holding as security for the obligation. This is called subrogation. On fulfillment of the obligation by the surety or the guarantor he steps into the shoes of the obligee so far as pursuing his rights against the principal obligor are concerned.

# EXAMPLE:

Baker and Allen entered into a contract based upon a valuable consideration in which Baker agreed to perform certain work for Allen. Carter was surety on the contract for Baker. Baker gave Allen, at the time of the making of the contract, certain railroad stocks as security for the performance of the obligation. Baker failed to fulfill his contract properly, whereupon Carter was obliged to make good the default. Upon performance by Carter he became entitled to have the railroad stocks turned over to himself from Allen. In other words, Carter stepped into Allen's shoes for all practical purposes in his dealings with Baker. This is called subrogation.

Unless otherwise expressly specified in the contract a surety is not entitled to notice in case the principal obligor defaults in the performance of his agreement. Being a party to the original contract a surety is bound to keep himself informed as to the acts of the principal. In an

unconditional guaranty for payment the general rule is that the guarantor can be sued without first giving notice of default. It is generally held, however, as to all other guaranties, unless otherwise specified in the contract, the guarantor is entitled to notice of the default to be given him within a reasonable time after the default occurs; also that the obligee shall first use due diligence to compel performance by the principal obligor before proceeding against the guarantor. If the guarantor can show that he suffered any loss by reason of the failure of the obligee to give this notice of default, the weight of authority is to the effect that he can escape liability unless it is otherwise expressly agreed in the contract of guaranty that the failure to give notice will not relieve the guarantor. It is generally held that "due diligence" in this connection means that the obligee shall bring suit against the principal obligor promptly upon default and shall use the customary process of court to obtain satisfaction of his claim. In many jurisdictions it is held that if the obligee finds that the principal is insolvent then he need not sue.

§ 311. Surety and Principal.—A surety and a guarantor are each entitled as against the principal obligor to be reimbursed for all expenses incurred in the fulfillment of their contract of suretyship or guaranty and likewise to be indemnified for any and all loss that they may sustain by reason of the failure of the principal to perform his primary obligation.

# **EXAMPLES:**

- 1. Carter, a surety for Baker, makes good to Allen for Baker's default. Carter is entitled to recover against Baker for all moneys paid in making good the default. This is properly called indemnification, although it is sometimes termed reimbursement. Cf. Ford v. Keith, 1 Mass. 139.
- 2. Carter, a surety for Baker to Allen, is sued by Allen for the alleged breach of Baker's contract. Carter defends the suit successfully, but in doing so he is obliged to employ attorneys and incur other

expenses. He is entitled to recover this expense from Baker. This is properly termed reimbursement.

§ 312. Surety and Co-Surety.— Where there are several sureties, if one of the sureties is required to pay the entire obligation he is ordinarily entitled to contribution from his co-sureties, that is, to compel his co-sureties to pay him their proportionate share of the entire amount which he has been required to pay.

#### **EXAMPLE:**

Carter, Donald and Everson are all sureties to Allen on Baker's contract. Baker defaults, whereupon Allen sues Carter and recovers for the total loss. Carter is entitled to have Donald and Everson each pay one-third of the entire amount which Carter is compelled to pay. This is contribution.

#### IV

# Discharge

§ 313. How Discharged.— A contract of suretyship may be discharged by the agreement of the parties, by the performance of the contractual obligation by the one primarily liable, by the unauthorized release by the obligee of the principal obligor, by the unauthorized surrender by the principal obligor of securities held by him belonging to the one primarily liable, by the alteration of the contract by the obligee without the consent of the surety, by the bankruptcy of the surety and by fraud practiced upon the surety by the obligee. He may also be discharged by a violation of the terms of the contract by the obligee.

In the event that the obligee grants a definite extension of time to the principal obligor, without consent of the surety or guarantor, or in the event that the principal obligee in any manner makes a new arrangement varying the terms of the contract without the consent of the surety, or guarantor, then such surety or guarantor is released from liability on the contract.

A guarantor may be discharged by the same acts which will discharge a surety, and also by the failure of the obligee

to give notice to the guarantor of the acceptance of the guaranty at the time of the making of the contract, and in some instances, by the failure of the obligee to give notice to the guarantor at the time of the default by the principal obligor, and also, by the failure of the obligee to use due diligence to compel performance by the principal obligor.

#### **EXAMPLES:**

1. Carter is surety to Allen on Baker's written contract. Without the knowledge or consent of Carter, Allen agrees with Baker for a valuable consideration that Baker may have six months longer in which to perform. This will ordinarily release Carter from his contract. Cf. Bank v. Lucas, 26 Ohio St. 385.

2. Carter is surety on Baker's contract to Allen. Baker fully per-

forms his contract. Carter is then released.

3. Carter is surety on Baker's contract with Allen. Allen releases Baker from liability without the knowledge or consent of Carter. This also releases Carter.

4. Carter is surety to Allen on Baker's written contract. Without the knowledge or consent of Carter, Allen and Baker agree to add an additional clause to the contract requiring Baker to perform additional work. This will ordinarily release Carter from all liability. Cf. U. S. v. Tillitson, I Paine 305.

5. Carter, a surety, is put into bankruptcy by his creditors. His discharge in bankruptcy releases him from liability on his contract of

surety.

6. Carter is surety on Baker's contract to Allen. Allen holds certain stocks and bonds as collateral security for the faithful performance by Baker of his contract. Allen returns these securities to Baker without Carter's knowledge or consent. This releases Carter.

7. Carter is surety on Baker's contract to Allen. In the contract Allen has agreed to perform certain material acts which he fails to

do. This may release Carter from his obligation.

8. Carter gives Baker a general letter of guaranty addressed "To Whom It May Concern." Allen sees the letter and sells goods to Baker on the strength of the letter, but fails to notify Carter of his acceptance of the letter of guaranty. Here Carter may not be liable because of Allen's failure to notify Carter of the acceptance of the guaranty.

9. Carter is a guarantor for collection of Baker to Allen. When the obligation falls due Allen fails to make proper demand on Baker

for performance and after Baker becomes insolvent Allen sues Carter. He cannot recover because it was his duty to use diligence to collect his claim from Baker. Cf. Evans v. Bell, 45 Texas 553.

#### $\mathbf{v}$

#### Conclusion

§ 314. Suggestions.— One should never agree to become a surety or guarantor for any person in whom one does not have the utmost confidence. It is advisable upon agreeing to become a surety or a guarantor to stipulate in the contract for notice of acceptance of the contract by the obligee, for notice upon default by the principal obligor, and also to incorporate all the conditions of the contract in the written instrument.

If one is an obligee in a contract and the principal obligor defaults in payment or performance, it is advisable to give prompt notice to the surety or guarantor of the default. An obligee should not agree to any delays in payment or performance by the principal obligor without first getting the written consent by the surety or guarantor.

# **QUESTIONS**

I. Define the terms, surety, guarantor, obligor, obligee, indemnification and subrogation.

II. Differentiate between the terms, guarantor, indorser and surety. Give an original illustration.

III. Name five kinds of guaranties and illustrate.

IV. What consideration ordinarily supports a contract of suretyship?

V. May a contract of suretyship be oral?

VI. Has the statute of frauds any application to this subject? If so, which section of the statute?

VII. Give some of the rights and liabilities of a surety and the principal obligor; of a guarantor and an obligee.

VIII. What will discharge a contract of guaranty? Of surety? Give five original illustrations.

IX. How many parties must there be to create a contract of surety? Why?

tract of surety?

X.

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# CHAPTER XXI

# **INSURANCE**

OUTLINE							
INSURANCE	I.	In General	Definition and Explanation Insurance, Not a Gambling Contract Historical Origin Essentials of Contract Delivery of Policy Waiver and Estoppel				
	II.	Fire Insurance	Standard Form of Policy Insurable Interest Description of Property Clauses Against Other Insurance				
		Life Insurance	No Standard Form Insurable Interest Suicide Incontestable clause				
	IV.	Accident Insurance	Accidental Injuries External, Violent and Accidental External and Visible Signs				
		Miscellaneous In surance	Marine Insurance				

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  \$ 316. Insurance Not a Gambling Contract
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  \$ 318. Essentials of Contract
  \$ 319. Agreement
  \$ 320. Mutual Assent
  \$ 321. Consideration
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#### Part II - Fire Insurance

§ 326. Standard Form

§ 327. Insurable Interest

§ 328. Description of the Property

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#### Part III - Life Insurance

§ 330. No Standard Policy

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§ 335. Accident Insurance

§ 336. External Violent and Accidental

§ 337. External and Visible Signs

§ 338. Miscellaneous

#### I

#### In General

§ 315. Definition and Explanation.— A contract of insurance is a contract whereby one party, called the insurer, agrees to reimburse, indemnify or protect another party, called the insured, against loss or liability upon a specified or agreed subject, arising out of some specified or agreed peril common to many persons, but which may or may not occur to the insured in the time specified. This definition is given with a view of including all of the elements necessary. Let us now examine these elements.

First.— Insurance is a contract and is therefore governed by contractual principles. Since the contract is ordinarily prepared in writing by the insurer it is held to be construed most strictly in favor of the insured, and against the insurer.<sup>a</sup>

Second.— The object of the contract is to protect, reimburse or indemnify the insured against damage, loss or liability. When a person takes out a policy of fire insurance, for example, he does so with the thought that if his house burns down, the insurer will reimburse him against the loss sustained.

<sup>(</sup>a) Vance on Insurance, p. 429. Mathews v. Modern Woodmen, 236 Mo. 326.

Third.— The contract must be on a specified or agreed subject, that is, the subject-matter of the contract must be definitely specified. For example, the house on which fire insurance is written must be particularly designated, or the ship which is insured against damage at sea must be

specified.

Fourth.—The contract has reference to some specified peril common to many persons, but which in a particular case is contingent, that is, which may or may not occur to the insured within the time specified. Death, for example, is a peril that is common to all; likewise accidents. Loss by fire is a peril common to the entire world; likewise loss by the sinking of ships at sea is a common peril to all engaged in shipping. Liability arising out of injuries to employees in factories and the like is also a peril common to working men engaged in that character of work. When a contract of insurance is made, it must specify the character of loss against which the insurer agrees to indemnify the insured, and also the period of time for which the contract is to endure.

#### **EXAMPLE:**

Allen, a jeweler, insures his life in the Baker Company. When Allen dies, his occupation is that of a bartender. The company declines to pay for the reason that the by-laws which are incorporated in Allen's application for the policy provide that the policy be forfeited if the insured became a bartender.

In the application itself, it is stated, however, that the policy is to be void only if the death of the insured *results* from the *change* to the prohibited occupation.

The beneficiaries of Allen will recover. Since the contract is evidently open to two constructions, the first, in favor of the insurer, the second, in favor of the insured,— the court follows the latter according to the proper rule of construction.

§ 316. Insurance Not a Gambling Contract.— The law disapproves of contracts of chance or gambling transactions. One of the important reasons for this rule is that such contracts encourage the participants to depend for their income

on chance events over which they have no control rather than upon their own labor and industry. Gamblers court gain through chance events. Although in a contract of insurance the insurer agrees to pay or reimburse the insured only on the happening of a contingency or a chance event over which the insured ordinarily has little control, still the contract is itself not a contract of chance. The insured does not seek to gain by the happening of a contingency, but merely to be reimbursed for the loss sustained. The insured, if honest, seeks to avoid misfortune or loss.

Again, since the peril is one common to many persons, a great number of whom have the same kind of contracts of insurance, many of such persons contribute but a small amount each to the insurer who is to return to those on whom the loss or peril falls the money which is received from the many persons, less a reasonable sum for his work and expense in the management of the enterprise. Insurance, then, is a contract which tends to equalize the perils common to business men, and is therefore one that encourages men to work without fear of losing their substance through some event over which they have no control.

§ 317. Historical Origin of Insurance.— The use of the general principles of insurance seems to be chiefly traceable to the merchants of Italy, who did an extensive maritime business during the middle ages. These merchants joined together to protect themselves against the perils of the sea, and this principle has been finally extended to all branches of business.

§ 318. Essentials of Contract.— In Insurance as in all other contracts there must be competent parties, agreement, mutual assent, consideration, lawful subject-matter and the form required by law.

Parties.— There must be at least two parties to a valid contract of insurance, but there may be more than two parties. A general insurance agent, for example, cannot write a valid contract of insurance on his own house, because he is representing both the company and himself in the same transaction. The party who issues insurance, as has been

previously indicated, is called the insurer, and the party to whom the insurance is issued is called the insured. There may also be a third party to a contract of insurance called the beneficiary. A beneficiary is that party to a contract of insurance who is to receive the money from the insurance company upon the happening of the loss to the insured. For example, if a man takes out insurance on his own life, for the benefit of his wife, the wife is the beneficiary, that is, upon the death of the insured she is the one who receives the money.

The subject of insurance is one that affects the entire world, and therefore the various states of this country have made strict rules and regulations indicating who and under what circumstances parties may engage in the insurance business and also what character of contracts of insurance may be issued. Insurance companies are of various kinds. Some are called stock-companies, that is, the business is owned by stockholders for whose benefit the same is conducted. Other companies are called mutual companies. They have no stock, but the companies are run for the benefit of all the persons insured. Still other companies are said to be "mixed," because they partake both of the character of stock-companies and mutual companies.

Infants, when insured, can recover from the insurance companies for the loss sustained. There is some question as to whether an infant may disaffirm the contract of insurance after the same has expired and recover the premiums paid. The better rule b would seem to be that he cannot do this. There is authority holding that an infant's executory contract of insurance may be disaffirmed by him.

§ 319. Agreement.— There must likewise be an offer and acceptance in order to create a contract of insurance. If the agent for an insurance company writes a policy, which is not delivered, or if a person applies for insurance that is refused, there is accordingly no contract and no liability on either party.

§ 320. Mutual Assent.— The element of mutual assent

<sup>(</sup>b) Vance on Insurance, p. 89.

is often wanting in alleged contracts of insurance. One of the causes for this may be the mistake of the parties as to the description of the property.

#### **EXAMPLES:**

- 1. Allen insures his house against fire in the Baker company, but gives the wrong lot number in his application. The agent of the company, however, knows the precise property which the company agrees to insure. Allen may recover for damage to the building, since the minds of the parties met as to the subject-matter.
- 2. Allen intends to insure a house standing on Blackacre but by mistake insures a dwelling on Whiteacre. Allen cannot recover for damages to the Blackacre house, since there was never any meeting of minds as to that piece of property.

Another cause often urged to avoid liability on the policy is that the insured made false representations 1 or false warranties to the insurer. For example, the insured makes certain representations which are material and which the insured knew were false. There, the contract may be avoided by the insurer. A breach of warranty on the part of the insured will usually avoid the policy. By custom today insurance companies make the applications for insurance a part of the policy and specifically designate all statements made in the application as warranties in order that the breach of any such statements, whether material or otherwise, may enable the insurer to avoid liability. By statute in many states all distinction between representations and warranties is abolished, and the policy is avoided only when the representation or warranty is of a material fact that contributes to the loss and was made with a knowledge of its falsity.

- § 321. Consideration.— In contracts of insurance the consideration paid by the insurer is called the premium.
- (1) The distinction between a warranty and a representation has been given in the chapter on Sales. It will be recalled that a representation is a statement that is made by one party to another as an inducement to enter into the contract, but which statement is not made an integral part of the contract. A warranty is such a statement as is incorporated in the contract itself.

The premium is the amount paid by the insured to the insurer for the protection afforded. While the amount paid by the insured is often very small as compared with the protection afforded, that fact does not affect the adequacy of the consideration, nor does it release the insurer from liability. Ordinarily, if the insured fails to pay the premium he

loses the protection of his policy.2

§ 322. Subject-Matter.— The subject-matter of a contract of insurance is the person or property insured. In order for a contract of insurance to be binding on the insured, the insured must have a substantial interest in the life or property insured. This is said to be an "insurable interest." It is generally presumed that if one has a valid and subsisting interest in the person or the property insured, this will lead him to use his efforts to see that such person or property continues in existence. If one has no such interest in the person or property insured, it would be to his advantage to aid in their destruction and thereby collect the insurance. The contract would then be a gambling transaction and not one for the benefit of the public at large as it is at present.

# EXAMPLE:

Allen owes Baker \$100. Baker insures Allen's life for \$3,000. When Allen dies, Baker can only recover \$100 on the policy. The Courts hold that as to the remaining \$2,900 the transaction is void since it amounts to nothing but a wager by Baker in Allen's life for that sum. Cooper v. Schaeffer, 9 Cent. Rep. (Pa.) 601.

- § 323. Form.— At the common law a contract of insurance might be oral or in writing, although the vast majority of such contracts were in writing. Unless the statutes otherwise direct, an oral contract of insurance is valid. If oral,
- (2) Modern policies of insurance provide that when there is a failure to pay a premium, the insured will either be granted an extension of his insurance for a certain period, or will be given paid-up insurance for an amount proportionate to the reserve value of the policy.

In general terms, the reserve value of a policy may be defined as a certain part of all the premiums paid which the company has accumulated for the purpose of discharging payment due under the policy upon its maturity. the parties must agree as to all of the terms of the contract just as is now being done in a written contract of insurance.

§ 324. Delivery of the Policy.— Where a policy of insurance is to be in writing, then unless by agreement the policy is to take effect prior to delivery, it will not be binding until delivered.

§ 325. Waiver and Estoppel.—In the law of insurance, waiver and estoppel for practical purposes produce the same result. Technically, a waiver is the giving up voluntarily of a known right; while estoppel is that bar or impediment which the law raises to prevent a person from asserting that which he previously denied either specifically or by his conduct, or from denying that which he previously asserted. For example, a policy of insurance provides that notice in writing be given to the insurer after a fire has occurred. If it can be shown that oral notice was given and that the insurance company acted thereon, making an attempt to adjust the loss with the insured just as if he had given written notice, there the insurer will be held to have waived or abandoned the provision of the policy, and in a suit on the policy the company will be estopped from setting up the failure to give the written notice as a defense. Again, where a policy provides that it shall become void if a premium is not paid when due, still if a general agent accepts an overdue premium and subsequent thereto a loss occurs the company will be liable.

# II

#### Fire Insurance

§ 326. Standard Form.— The various states have now enacted statutes regarding fire insurance compelling the use of certain standard forms of policy. In some states these forms may be somewhat varied by the parties thereto. These policies contain certain conditions, the existence of some of which make the policy absolutely void, of others of which may render the contract void while in existence, and

of still others of which require compliance by the insured before he can collect.

§ 327. Insurable Interest.— It is not necessary for the insured to be the sole or absolute owner of the property insured.° He may have either a legal or equitable interest in the property. Whatever interest he has should be truth-

fully stated in the policy.

§ 328. Description of the Property.— The property insured must be definitely described. Where the description of real estate is so vague as not to be capable of accurate ascertainment or where an entirely inaccurate description is given there is no valid insurance. If the location of personal property is given as defining the risk, then if the property is destroyed elsewhere, no recovery will be allowed. But when the location of personalty is given merely to aid in the description and identification of the property, then a change of location will not affect the insurance.

#### **EXAMPLES:**

- 1. Allen insures in the Baker Insurance Company certain merchandise described as "contained in the Carter Building." For a destruction of the merchandise in a place other than the building named, Allen may not recover, since the goods are insured only in their defined location.
- 2. Allen insures in the Baker Company certain horses described as those in a "hotel barn." If injury occurs to the horses outside of the barn, Allen may recover because the insured property is of such a character that its temporary absence from the specified place is necessarily incident to the use and enjoyment. Here, the location of the horses is given merely to identify them. Cf. Niagara v. Elliott, 85 Va. 962.
- § 329. Other Insurance Mortgages.— In the standard form of fire policies it is stated that the policy shall be void if insured has, during the term of the policy, procured other insurance on the same property. This is to avoid double insurance on the property. This provision is valid and the insurer is released if violated. In order to avoid

<sup>(</sup>c) 14 Ruling Case Law, p. 910 ff.

the effect thereof insurance companies, on notification, usually allow additional insurance and validate the policy by

attaching a rider thereto to that effect.

One of the provisions in fire insurance contracts on personal property is that if there is a chattel mortgage on the property then the contract is void. The violation of this provision will avoid the contract. Riders are often attached permitting a chattel mortgage.

#### Ш

#### Life Insurance

§ 330. No Standard Policy.— There is no standard form of life insurance policies but there are many provisions and conditions found in the policies of one company that are

likewise found in the policies of other companies.

- § 331. Insurable Interest.— A person always has an insurable interest in his own life and he may therefore take out a policy on his own life payable on his death to some stranger. Likewise one closely related by blood or marriage has an insurable interest. For example, a father has an insurable interest in the life of his son, and a wife in the life of her husband, etc. Again, if one owes money to another then to the extent of the loan the creditor has an insurable interest in the life of the debtor. In all these cases the law presumes that it is to the interest of the beneficiary that the insured should continue to live and hence the beneficiary would not be likely to do any act which would cause the death of the insured. If, however, one, a total stranger, could take out a policy of insurance on the life of another, then there might be an inducement to cause the death of the insured and the contract would become a gambling transaction.d
- § 332. Suicide.— The weight of authority is that the self-destruction of the insured whether sane or insane will not allow the insurer to escape liability, there being nothing

<sup>(</sup>d) 6 L. R. A. 136 ff.

to the contrary in the policy, unless the policy was taken out with the intention of committing suicide, in which event the insurer will be released. Where the policy provides that in the event of suicide the policy will be void this provision will apply if the insured was sane at the time of the self-destruction. But when the policy provides that it shall be void in the event of suicide whether the insured was sane or insane then by the weight of authority the policy will be avoided in the event of self-destruction.

§ 333. Death in Violation of Law.— Many policies provide that the insurer shall not be liable if the insured comes to his death in consequence of the violation of the law. Thus where a man is executed for committing murder and where a burglar is shot by the police while in the act of burglarizing a home, there can be no recovery on the policy. It has also been held that even though such a provision is not found in the policy the insurer is still exempt on the

grounds of public policy.º

§ 334. Incontestable Clause.— In many policies of life insurance there is found a provision that after a certain length of time the policy shall be incontestable except for certain specific causes. This clause is valid and is binding on the insurer. Where the insured has no insurable interest, however, in the life of the insured this renders the entire contract illegal and hence although not excepted in the incontestable clause this defense can still be urged successfully by the insurer.

§ 335. Accident Insurance.— An accident is an unexpected occurrence. An accidental injury is an injury to the person of the insured coming unexpectedly and uninten-

tionally, and out of the ordinary course of events.

§ 336. External, Violent, and Accidental.— Accident policies employ the terms external, violent, and accidental. It was the desire of the insurance companies by the use of these terms to confine liability to causes where the injury was occasioned by external force alone. There are many cases, however, where the insurers are held liable though

<sup>(</sup>e) 25 Cyc. 875.

no external force be applied.<sup>f</sup> Thus, if one attempts to lift a heavy weight and bursts a blood vessel, this has been held to permit a recovery. Death by choking from food has also been held to be accidental.

§ 337. External and Visible Signs.— Accident policies provide that there must be external and visible signs of the injury received in order to hold the insurer. This provision has been held to be inapplicable to cases where death has ensued. It has likewise been held that the injury itself need not be external and visible, provided the evidenc of accidental injury can been seen by the eye or ascertained through the senses.

§ 338. Miscellaneous.— There are numerous important types of insurance other than fire, life and accident. For example, marine insurance deals with loss sustained on account of the perils of the sea. It is accordingly of great importance to the commerce of the world. Again, since the growth of the automobile industry, automobile insurance has become one of the most profitable branches of the business. Both prior to and since the passage of statutes in the various states compensating workmen for injuries received under certain circumstances regardless of the negligence of the employer, liability insurance, protecting employers from loss through claim of employees, has become a necessary incident to the conduct of business. This and numerous other types of insurance that might be mentioned are all governed by the same general laws applicable to the construction of insurance policies. Owing to the necessary limitations of this work it is impossible to discuss these subjects in detail.

# **QUESTIONS**

- I. Define insurance, insurable interest, estoppel and waiver.
- II. State why a contract of insurance is not a gambling contract.

<sup>(</sup>f) 14 R. C. L. p. 1239 ff.

III. What are the essentials of a valid contract of insurance?

IV. Why is an insurable interest a necessary essential in all contracts of insurance?

V. What relation does a beneficiary in a life insurance policy have to the insured?

VI. Can an insurer complain because the insured had no insurable interest after the loss has occurred?

VII. What is the incontestable clause in life insurance policies.

VIII. Does suicide relieve the insurer? Explain fully.

IX. What are accidental injuries? What are external and violent injuries?

X. Why is marine insurance of importance?

XI. Give an example of property inaccurately described. Give an example of death by accidental injury.

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#### CHAPTER XXII

# **NEGOTIABLE INSTRUMENTS**

OUTLINE (1) Promissory Notes 2) Bills of Exchange Kinds 3) Checks 1) Must Be in Writing 2) Must Be Signed 3) Must Contain an Unconditional Promise or Order II. Requisites to Pay a Sum Certain in Money NEGOTIABLE INSTRUMENTS of Negotiable In-4) Must Be Payable at a Definite Time or on Demand 5) Must Be Payable to Order or Bearer struments 6) Must Name or Indicate Drawee of a Bill of Exchange III. Assignability and Negotiability Differentiated 1) Delivery 1) Special 2) In Blank IV. Negotiation 2) Indorsement (3) Qualified 4) Restrictive (5) Conditional 1) Not in Due Course Subject to all Defenses as if Holders Non-Negotiable Instrument 2) Holders in Due Course Free from all Equities (1) Contract of Maker of Promissory Note and Acceptor of Bill of Exchange - Primarily Liable VI. Relation-2) Contract of Indorser and of Drawer of Bill of Exship of change - Secondarily Liable - They make Cer-Parties tain Warranties - Excused in Certain Cases by Outlined Conduct of Holder of Instrument

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	(		(I)	By Payment by or for Debtor
	VII.	Discharge	2)	By Payment by or for Party Accommodated
		of Nego-	3)	By Payment by or for Party Accommodated By Intentional Cancellation
		tiable In-	14)	By Acquisition of Instrument by Principal Debtor
				By any Act which Discharges Principal Contract
			3/	for Payment of Money
			C \	
				By Any Act Which Discharges the Instrument
4			2)	By the Voluntary Discharge by the Holder of a
				Prior Party
	VIII.	Discharge	3)	By a Valid Tender of Payment by a Prior Party
		of Those	4)	By Extension of Time of Payment Without Consent
		Seconda-	1	of Party Secondarily Liable
		rily Lia-	5)	By Any Act which Discharges Principal Contract
		ble	- 7	Secondarily Liable by the Holder
			6)	In Certain Cases by Failure to Protect Instrument
			,	and to Cive Notice of Dishapar

and to Give Notice of Dishonor

- 339. Historical sketch
- 340. Negotiability and assignability differentiated
- 341. Definitions
- 342. Requisites of negotiable instruments

Part I - In General

# Negotiable Instruments Act

§ 343. Historical

#### Part II - Negotiation

- 344. What constitutes negotiation
- § 345. Delivery
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- § 347. Kinds of indorsement

# Part III - Rights of Holders

- § 348. Definitions
- § 349. Defenses

# Part IV - Contract of Maker; Also of Acceptor

- § 350. Liability of maker
- § 351. Contract of acceptor
- § 352. Kinds of acceptance

- § 353. When acceptance is necessary
- § 354. How made
- § 355. When presentment is excused
- § 356. Bill dishonored
- § 357. Duty of the holder upon dishonor
- § 358. Effect of acceptance

#### Part V - Contract of Drawer and Indorser

- § 359. Contract of drawer
- § 360. Presentment for payment what constitutes such presentment
- § 361. When presentment for payment may be dispensed with
- § 362. When presentment must be made
- § 363. Notice of dishonor what constitutes notice of dishonor
- § 364. By whom and to whom
- § 365. Contract of indorser of a negotiable instrument
- § 366. Order in which indorsers are liable
- § 367. Irregular and accommodation indorsers

# Part VI - Discharge of Negotiable Instruments

- § 368. Instruments how discharged
- § 369. Discharge of those secondarily liable
- § 370. Effect of material alteration of instrument

#### I. In General

- § 339. Historical Sketch.— Just as partnerships and corporations sprang into existence and grew in importance as a result of increased commercial activity, so the use of commercial paper came about in the same way. In the early days of civilization, business transactions took the form of barter or exchange. For example, Allen had a hunting dog which Baker wanted, and Baker had a bow and arrow which Allen wanted. Hence they exchanged or traded. As business grew, various commodities which were very common were used as a standard of value. Then money came into use. Money may be defined to be "any material that by agreement serves as a common medium of exchange and measure of value in trade." a
  - (a) Standard Dictionary: Money.

As commercial activities continued to grow and men's confidence in one another became more marked, they came to use certain written instruments in the place of metallic money. Thus, Allen of England owed Baker of Italy one thousand dollars. Baker wished to buy one thousand dollars' worth of goods from Carter of England. Baker thereupon wrote Allen a letter, requesting him to pay Carter the one thousand dollars which is due, and Baker further agreed that if Allen paid the money to Carter, then the old debt would be cancelled. Allen agreed to comply with the request. In this way Allen avoided sending the money which he owed Baker, across the ocean to Italy, and Baker saved the expense and delay necessary to sending the money from himself, in Italy, to Carter, in England. After a while it grew to be quite customary for a man of one state or country transacting much business with a man of another state to use this method of doing business, and thus save the danger, as well as the expense and trouble, of transporting metallic money from place to place. Such requests or orders by a party in one state on a party in another state, requesting such second party to pay a sum of money to a third party, came to be known as "Foreign Bills of Exchange." Evidence has been found that such bills of exchange were used by Italians as early as the twelfth century. Their use came to be known in England and the merchants of that country took very kindly to them. This was the beginning of the use of commercial paper, which has been very aptly said " to include all those instruments of indebtedness which are treated and used, in the commerce of the world as the equivalent or representatives of money, or which are given the characteristics of money in the furtherance of commercial needs." b

After foreign bills of exchange were very generally used, it was found that it would be convenient to use such instruments between people living in the same country, hence, what are known as "Inland Bills of Exchange" were created. By a few steps further, checks, promissory notes, and a num-

<sup>(</sup>b) Tiedeman on Bills and Notes, § 2.

ber of other forms of instruments were invented and received the sanction of the law.

§ 340. Negotiability and Assignability Differentiated. — With this rough sketch of the history of commercial paper, we are now ready to inquire into the distinction between commercial paper that is negotiable and that which is

not negotiable.

Commercial paper which is not negotiable is said to be assignable. The student has learned that the rights growing out of contracts are often assignable. By the common law, however, the assignee of such rights could not sue in his own name, but was obliged to sue in the name of the assignor. For example, if Allen had one hundred dollars due him as money due on contract from Baker, Allen could assign his right to the money to Carter. If afterwards Baker failed to pay, then by the common law, Carter could not sue Baker, but was obliged to sue in the name of Allen. In the very early common law, if Allen wished to be disagreeable, he could prevent Carter from using his (Allen's) name. This, of course, resulted in hardship and dissatisfaction. Gradually the rule was changed so that if the assignee stated in the petition that he was suing for his own benefit, although he was using the name of the assignor, then the assignor could not interfere in the suit. But even under the rule as changed, if any reason existed why the debtor (the person who owed the money) would not have to pay the money to the assignor, then notwithstanding that the assignee knew nothing of such reason when the contract was originally assigned to him, yet he could not recover from the debtor.

# **EXAMPLE:**

Allen sold Baker \$1,000 worth of goods on credit, and, after Baker received the goods, he discovered that Allen had not complied with certain conditions of the contract of sale. In the meantime Allen assigned his rights in the contract to Carter, who knew nothing of Allen's breach of contract. When Carter wished to collect the \$1,000 from Baker, the latter refused to pay all the money on the ground that he had an offset against Allen for the breach of the original contract. This Baker could lawfully do.

While the change was taking place from the old common law rule (which permitted interference by the assignee in a suit against the debtor) to the new common law rule (which permitted no interference by the assignor), the merchant soon came to realize the necessity for more convenient business methods and a fairer legal rule in the way of certain forms of commercial paper. It became necessary in order to expedite business that if certain forms of commercial paper (at first, such as bills of exchange, and later, promissory notes and checks) were to have any value in business and were to have the attributes of money, then such paper must be capable of free assignment from hand to hand without all the regulations which apply to ordinary contracts, and, through the influence of merchants, the legal rule finally came to be established that if bills of exchange, promissory notes, and checks were made payable to the assignee "or his order," or if made payable to bearer, then the assignee could sue on them in his own name and be free from any interference by the assignor. Moreover, the further rule was established that the assignee of such commercial paper as bills of exchange, promissory notes, and checks, did not take them subject to so-called "equities"; i. e., any defenses not appearing on the face of the instrument, except such defenses as would absolutely negative the instrument as a monetary obligation. By "negativing the instrument as a monetary obligation" is meant rendering the instrument absolutely worthless in the hands of any person whatever. If, for example, the instrument were a forgery, such a defense could always be set up by anyone sued on the instrument, as it would negative the value of the instrument as a monetary obligation. So, if the person making the instrument was an insane person under guardianship, the instrument would have no value as a monetary obligation. But there are many equities which do not absolutely negative the instrument as a monetary obligation and these equities cannot be relied on as a defense in an action brought by a bona fide holder of a negotiable instrument (one who has lawful title and possession of the instrument), who had

paid full value therefor and who purchased the instrument before maturity, and who knew nothing of such defenses before he took the instrument.

#### **EXAMPLES:**

- Allen made a contract with Baker in which Baker agreed to deliver ten new Cleopatra pianos to Allen, in consideration for which Allen was to pay Baker ten thousand dollars. Baker delivered the pianos, but one of them was not new and was accordingly only worth one-half of what a new piano was worth. Baker after delivering the pianos to Allen went to Carter and showed him the written contract, and asked Carter to pay him (Baker) the ten thousand dollars, as he needed the money. Carter gave Baker the ten thousand dollars and Baker assigned his rights in the contract to Carter, whereupon Carter demanded the money from Allen. Allen refused to pay the full amount because he claimed a deduction of five hundred dollars on account of the fact that one of the pianos was not new. Allen had the legal right to a deduction, because of the breach of contract on the part of Baker, and because further Carter had no greater rights than Baker, as the contract was merely an assignable one and not a negotiable one.
- 2. In payment for a buggy, guaranteed to last for one year, which Baker delivered to Allen, the latter gave the former a note reading as follows:

St. Louis, Mo., January 4, 1910.

\$150.00

One month after date I promise to pay to Richard Baker, or order, the sum of One Hundred and Fifty Dollars.

JOHN ALLEN.

The note did not state anything about the guaranty. Baker sold the note before maturity to the Carter Bank for \$150. Two days after the sale of the note, the buggy fell to pieces because of poor construction. The Carter Bank demanded that Allen pay the \$150, but Allen refused to do so on the grounds that the buggy which he had purchased from Baker was worthless. Inasmuch as the Carter Bank knew nothing of the poor quality of the buggy for which the note was given, and as nothing was said on the face of the note about an existing guaranty, and as the written instrument, which Allen gave Baker was made payable to Baker, "or his order"—such a defense could not be set up by Allen. The Carter Bank could recover in full on the note which was a negotiable instrument.

3. Allen forged the name of Baker to a promissory note, which read as follows:

Chicago, Illinois, January 2nd, 1914.

"\$1,000.00

"One day after date I promise to pay John Allen, or order, One Thousand Dollars, with interest from date at the rate of six per cent per annum for value received.

(Signed) "RICHARD BAKER."

Allen then endorsed this note on the reverse side thereof, and sold it to the Carter Bank for \$1,000, less the usual rate of discount. Allen then left Chicago and disappeared. The Carter Bank presented the note to Baker for payment but Baker refused to pay. The bank could not recover because the note was a forgery, and this absolutely negatived it as a monetary obligation. It was of absolutely no value, no matter into whose hands it came and no matter what they paid for it.

A negotiable instrument, then, is one which can be transferred freely from party to party up to the time of its maturity (the time when it is due), and is one in which the holder of the instrument, provided he has paid value for it, takes it free from any defenses not appearing on the face of the instrument, except such defenses as absolutely negative the instrument as a monetary obligation, unless such holder had notice before he bought the instrument that certain defenses existed thereto. On the other hand, an assignable instrument is one which can be assigned by one party to another, but which gives the assignee no better rights than the first party had to whom the instrument was originally made payable.

§ 341. Definitions.— Although the student is probably familiar with the ordinary terms current in the subject of negotiable instruments, still in order that he may get a more accurate idea of those terms we pause for a moment to de-

fine them.

A bill of exchange is an unconditional written order by one party (called the drawer) on a second party (called the drawee) in which such second party is directed to pay a sum certain in money on demand or at a definite time to the bearer of the instrument or to some third person or his order (called the payee). The person who draws the bill is called the drawer. The party on whom the instrument is drawn, that is, the second party, is called the drawee and the party to whom the money is to be paid (or if the bill is payable to the drawer himself, then the bearer) is said to be the payee. In order to hold the drawee liable on a bill of exchange he must show his intention to be so held by writing the word "accepted" on the face of the instrument and sign his name thereunder. He is then called the acceptor. A bill of exchange is "foreign," if it is to be paid in a different country, or, in the United States, in a different State, than that in which it is originally drawn. A bill of exchange is said to be "inland" if it is to be paid in the same State in which it is drawn.

A check is an unconditional written order drawn by one party on a bank and directing the bank to pay a sum certain in money, on demand, either to the bearer of the check or to some third person or his order. By this it will be seen that a check is nothing more than a bill of exchange drawn on a bank with the additional elements that the check is to be paid on demand and that it is presumptively drawn on a fund which the drawer has deposited with the bank. A check is said to be certified if the bank has written the word "certified" on the face of the check. When this word is written on the check by the bank then the bank notifies the public that it will unconditionally pay the check provided the party to whom it is made payable presents it.

A promissory note is an unconditional written promise by one party to pay to bearer or to pay to a second party or his order either on demand or at a definite time, a sum certain in money. The person who makes the promise to pay is called the maker, the one who is to receive the money

is called the payee.

The holder of a negotiable instrument is the payee or indorsee who is in possession of the instrument, or, if the instrument is payable to bearer, then the bearer.

## Form of Bill of Exchange

\$1,000.00 St. Louis, Mo., Jan. 2, 1910.

Fifteen days after date pay to the order of Thomas

Carter the sum of One Thousand Dollars and charge same
to the account of

IOHN ALLEN.

To Richard Baker, Springfield, Mo.

The drawer of this bill is John Allen; the drawee is Richard Baker and the payee is Thomas Carter. If Richard Baker wishes to do as requested then he will write across the bill the words "Accepted, Springfield, Mo., Richard Baker."

#### Form of a Check

#### THE ST. LOUIS BANK

St. Louis, Mo., Jan. 2, 1910.

Pay to the order of Richard Baker \$100.00. One Hundred and no-100 Dollars. John Allen.

The drawer of this check is John Allen; the drawee is The St. Louis Bank; the payee is Richard Baker or anyone to whom he endorses the check.

## Form of a Promissory Note

\$2,000.00 St. Louis, Mo., Jan. 2nd, 1910.
Three months after date I promise to pay to the order of Richard Baker the sum of Two Thousand and no-100 Dollars.

JOHN ALLEN.

The promissor on this note is John Allen; the promissee is Richard Baker.

Although the technical terms of "bills of exchange," "checks," or "promissory notes" are not necessary to constitute an instrument strictly negotiable, yet it will be found that all negotiable instruments may finally resolve themselves into a grouping under one of these classes.

The forms given above may be taken as fair examples of the forms ordinarily used in commercial transactions. It must be said, however, that no definite form is neces-

sary so long as the instrument contains the essentials of negotiability, which will be discussed in the next paragraph.

§342. Requisites of Negotiable Instruments.— The instruments to be negotiable must conform to the following

requirements:

(if in the nature of a promissory note) or by the drawer (if in the nature of a bill of exchange or a check).

(2). It must contain an unconditional promise (if in the nature of a promissory note) or order (if in the nature of a bill of exchange or check) to pay a sum certain in money.

(3) It must be payable on demand, or at a fixed or de-

terminable future time.

(4) It must be payable to order or to bearer.

(5) It must definitely name or indicate who is the drawee of the instrument, provided the instrument is in the nature of a bill of exchange or check.

# Negotiable Instruments' Act

- § 343. Historical.— For many years the law of negotiable instruments in the several States of the United States was, and in some States still is, in a chaotic condition. Each State had its own precedents regarding most of the important problems and these precedents were usually different than, or in some way conflicted with the precedents in other States. On the recommendation of The American Bar Association, a number of States appointed a Board of Commissioners with a view to making the civil law of the several States more uniform. In 1896 this Board of Commissioners recommended to the various State legislatures an act, which they called The Negotiable Instruments' Law and which was modeled closely after the English Act on Bills of Exchange and Promissory Notes. At the present writing over twenty States o have adopted this act or code as a part of the statutory law, thereby superseding the common law on those
- (c) Colorado, Connecticut, Florida, Idaho, Iowa, Kentucky, Louisiana, Massachusetts, Maryland, Missouri, New Jersey, New York, North Dakota,

subjects of which it treats. This negotiable instruments' law will be largely followed in the remainder of this chapter.

## II. Negotiation

§344. What Constitutes Negotiation.—An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorse-

ment of the holder completed by delivery.

§ 345. Delivery.— Delivery is the transfer of possession, either actual or presumptive, from one person to another. If, for example, Allen would hand Baker a negotiable instrument with the intention of transferring possession, this would be an actual delivery. If, however, Allen would hand the key of his desk to Baker, at the same time saying, "Baker, here is the key to my desk. Go and take possession of the promissory note in my desk made payable to you by me," — this would give Baker constructive possession of the note until Baker actually got the note when he would have actual possession.

§ 346. Indorsement.— An indorsement is a contract written on the back of a negotiable instrument. The one who makes the indorsement is called the indorser and the one to whom the indorsement is made is called the indorsee. Strictly speaking an indorsement is a contract written on the back of a negotiable instrument whereby the indorser transfers his full legal title to the instrument and also guarantees payment of the instrument at maturity, provided the parties primarily liable <sup>1</sup> fail to pay and provided further that cer-

North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Washington, Wisconsin.

(1) The person or persons primarily liable on an instrument are those who by the terms of the instrument are absolutely required to pay the same; as for example, the promissor in a promissory note and the acceptor of a bill of exchange and a bank when it certifies a check. All other parties are secondarily liable. In some states one who indorses a negotiable instrument as an accommodation to the maker is primarily liable on the instrument. Night & Day Bank v. Rosenbaum, 191 Mo. A. 559.

tain requirements of the law in relation to negotiable instruments are complied with.

§ 347. Kinds of Indorsement.— An indorsement may be either special or in blank; or it may also be qualified, restrictive, or conditional.

A special indorsement specifies the person to whom, or to whose order the instrument is to be paid; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. For example, "Pay to the order of Richard Baker — John Ailen." To further negotiate this instrument Richard Baker would have to indorse it.

An indorsement in blank specifies no indorsee and an instrument so indorsed is payable to bearer and may be negotiated by delivery. The indorser simply writes his name on the back of the instrument.

A qualified indorsement constitutes the indorser a mere assignor of the paper. A qualified indorsement passes title to the paper without rendering the indorser liable to pay for the indorsement on default of the parties primarily liable. The words "without recourse" are usually employed to indicate an intention to become a qualified indorser. Such indorsement does not impair the negotiable character of the paper. An unqualified indorser is one who does not qualify his indorsement.

A restrictive indorsement is one which is made with restrictions as to the *purpose* of the indorsement. An indorsement is restrictive which does one of the following three things:

(1) One in which the instrument is indorsed for payment to one particular person, as, "Pay to Richard Baker only."

(2) One in which the instrument is indorsed to the indorsee who is to collect the money as agent for the indorser, as "Pay to Richard Baker for collection. John Allen."

(3) One in which the indorsee is to collect the money for the benefit of some third person, as, "Pay to Richard Baker for the benefit of Thomas Carter. John Allen." A restrictive indorsement renders the instrument non-negotiable unless the restriction is removed by the indorser.

A conditional indorsement is one by which the indorser annexes some condition (other than the failure of prior parties to pay) to his liability, as "Pay to order of Richard Baker when he reaches his majority. John Allen."

## III. Rights of Holders

§ 348. Definitions.— A holder of a bill of exchange is a person who is legally in possession of it, either by indorsement and delivery, or by delivery alone. A person may be a "holder in due course," 2 or a "holder not in due course."

A holder in due course is a holder who has taken the instrument under the following conditions:

(I) That it is complete and regular on its face.

(2) That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact.

(3) That he took it in good faith and for value.

(4) That at the time the instrument was transferred to him, he had no knowledge or notice of any infirmity in the instrument or defect in the title of the person transferring it.

A holder not in due course is one in which any one of the

foregoing four conditions is wanting.

§ 349. Defenses.— In the hands of a holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if the instrument were non-negotiable or assignable. A holder in due course takes a negotiable instrument free from so-called equities — which have been previously defined as those defenses not appearing on the face of the paper,— provided such defenses do not absolutely negative the instrument as a momentary obligation. Another way to state this is that a holder in due course

<sup>(2)</sup> A holder in due course is often called a "bona fide holder for value."

holds a negotiable instrument free from all personal defenses and may enforce payment against all parties liable on it, but he does not hold the instrument free from so-called — absolute defenses.

Personal defenses may be said to be those defenses which do not appear on the face of the instrument but at the same time do not absolutely render the instrument worthless as a monetary obligation. They are those defenses which might be set up between the original parties to the instrument or against one not a holder in due course. Examples of personal defenses are failure or want of consideration, payment of a bill or note before maturity and without cancellation or surrender of the instrument thereby making it possible to re-indorse it to some further holder in due course.

Absolute defenses are those defenses which absolutely negative the instrument as a monetary obligation. Examples of absolute defenses are incompetency of the primary obligor, such as insanity or infancy, and illegality of the consideration when a statute declares such contracts void,

and forgery.

#### **EXAMPLES:**

1. Baker sold Allen a buggy for \$500 in payment for which Allen gave Baker a promissory note. Baker immediately sold the note to Carter who was a holder in due course. Two days after Allen received the buggy it fell to pieces because of poor workmanship on the part of Baker, the maker. Allen desired to escape payment on the note. He could not do so because it was in the hands of a holder in due course. But if Baker had not transferred the note to a holder in due course, Allen could have set up the defense of the failure of consideration. Cf. Cristy v. Campau, 107 Mich. 172.

2. Donald forged Allen's name to a promissory note. Then Donald sold the note to Carter who was a holder in due course. Carter could not collect the note from Allen inasmuch as Allen had never signed the note and the forgery of a man's name does not make him liable on an instrument. Cf. Negotiable Instruments' Law, Sec. 30.

3. Allen was declared to be insane by a court having jurisdiction and a guardian was appointed for him. Allen then signed a promissory note for \$1,000 to Baker. Baker sold the note to Carter, a

holder in due course. Carter sued Allen for the \$1,000. He could not recover, for the insanity of Allen absolutely negatived the instrument as a monetary obligation.

## IV. Contracts of Maker; Also of Acceptor

§ 350. Liability of Maker.— The maker of a promissory note engages absolutely that he will pay the instrument according to its tenor. The holder of the note need do nothing to fix the maker's liability. Although it is customary for the holder to present the note to the maker on the day of maturity, still the failure to do so will not affect the maker's liability on the instrument. The maker is a primary obligor and he can discharge his liability only by payment or the equivalent of payment, such as a legal release or the operation of the statute of limitations.

§ 351. Contract of Acceptor; Who is an Acceptor.—As has been previously indicated, an acceptor of a bill of exchange is a drawee to whom the bill has been presented and who has signified his intention to become primarily liable on the instrument by writing the word "accepted" or its equivalent on the face of the bill or on a paper attached to the bill and signing his name thereunder. Only the drawee of a bill or some one acting for him may be

the acceptor.

§ 352. Kinds of Acceptances.— An acceptance may be either qualified or unqualified. An unqualified acceptance is one in which the acceptor assents to the terms of the instrument as drawn and agrees absolutely to pay the instrument according to its tenor. A qualified acceptance is one in which the acceptor does not fully assent to the instrument as originally drawn. If, for example, the acceptor would agree to pay only a part of the bill of exchange or if he would change the time of payment, his acceptance would be qualified. When a holder presents a bill of exchange he may demand that the acceptance be unqualified. If he permits the acceptor to qualify the acceptance and does not obtain the consent of the drawer and indorsers to such

qualified acceptance, he releases them from their liability on the instrument as secondary obligors. When a holder demands an unqualified acceptance, and the drawee refuses to comply with the demand the bill is then said to be dishonored.

§ 353. When Presentment for Acceptance is Necessary.— Presentment for acceptance must be made in the fol-

lowing cases:

(1) Where the bill is payable "after delivery," that is, after presentment to the drav/ee, or in any other case where presentment is necessary to fix the maturity of the instrument.

(2) Where the bill expressly stipulates that it shall be

presented for acceptance.

(3) Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

Presentment for acceptance may be made in any other

cases if the holder of the bill sees fit to do so.

The drawee of a bill is allowed twenty-four hours to decide whether or not to accept; if he refuses to return the bill after that period of time has elapsed, he is deemed to

have accepted it.

§ 354 How Made.— Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day, and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf. When a bill names two or more drawees, presentment must be made to all unless they are partners when presentment to one is sufficient.

§ 355. When Presentment is Excused.—Presentment for acceptance is technically said to be "excused" in the fol-

lowing cases:

(1) Where the drawee is dead or has absconded, or is a fictitious person, or is a person not having capacity to contract by bill of exchange.

(2) Where after the exercise of reasonable diligence

presentment cannot be made.

§ 356. Bill Dishonored.— A bill is said to be dishonored for non-acceptance in the following cases:

(1) When the holder demands, and the drawee refuses

to give an unqualified acceptance.

(2) When presentment for acceptance is excused, as

indicated in the next preceding paragraph.

- § 357. Duty of the Holder Upon Dishonor.— If a bill is dishonored by non-acceptance the holder must give notice of the dishonor to the drawer and the indorsers in order to hold them liable on the instrument. The failure on the part of the holder to give such notice unless it be impossible for him to do so releases the drawer and indorsers from liability on the instrument. If the instrument be a foreign bill the holder must also have it "protested" or the drawer and indorsers will be released from liability thereunder. The word "protest" comes from the Latin protestor signifying to declare in public, or to bear witness, or to testify. In the law of negotiable instruments, protest may be said to be a form of declaration in writing by a notary public (or sometimes by two reliable citizens where no notary resides in the district) that the bill of exchange has been presented for acceptance and acceptance has been refused.3
- § 358. Effect of Acceptance.— If a drawee unqualifiedly accepts a bill, he absolutely engages to pay it according to its tenor. He becomes the primary obligor on the instrument. If the drawee qualifiedly accepts a bill and such qualified acceptance is assented to by the holder without the consent of the drawer and the indorsers having been first obtained, then such drawer and indorsers are released from liability on the instrument but the acceptor is liable to the holder in accordance with the terms of his acceptance. If the drawer and indorsers do give their consent to such

<sup>(3)</sup> The word protest is also used in negotiable instruments to mean that any negotiable instrument has been presented for payment, that payment has been refused, and that the notary has drawn up the necessary notice of the dishonor.

qualified acceptance then they remain liable as secondary obligors just as if the acceptance had been unqualified.

#### V Contract of Drawer and Indorser

§ 350. Contract of Drawer.— We have seen that the maker of a note and the acceptor of a bill are primary obligors and that they engage absolutely to pay the instrument. The drawer of the bill, however, is a secondary obligor and he engages to pay the bill only under certain conditions. It may seem strange to the student that the drawer of a bill should be considered a secondary obligor when as a matter of fact he is the person who originally drew up the instrument. The reason for this is, however, that the drawer of a bill is presumed to have some funds with the drawee and that if the drawee accepts the bill the contract is then between the drawee and the holder.

It has been said that the liability of the drawer of a bill becomes absolute if certain conditions are fulfilled. These conditions are as follows:

The bill must be duly presented to the drawee for acceptance if the bill is of such a character that presentment for acceptance is necessary.

(2) If the bill is dishonored the drawer must be imme-

diately notified to the effect.

(3) The bill must be duly presented for payment on the day of maturity unless it has previously been dishonored for non-acceptance.

(4) If the bill is dishonored by non-payment, the drawer

must be notified of that fact.

(5) If the bill is a foreign one it must also be protested for non-acceptance or non-payment or both as the

case may be.

We have considered in detail all the technical terms used in the enumeration of these conditions except the phrases "presentment for payment" and "notice of dishonor." Inasmuch as the rules applicable to presentment for payment and notice of dishonor hold good for all negotiable instruments, in treating this subject the rules applicable to all

negotiable instruments will be given.

§ 360. Presentment for Payment; What Constitutes Such Presentment.— To present a negotiable instrument for payment means to exhibit the instrument to the one primarily liable on the instrument and to demand expressly or impliedly that he pay the same. Presentment for payment to be sufficient must comply with the following requisites:

(1) It must be presented by the holder or by some per-

son authorized to receive payment on his behalf.

(2) It must be presented to the person primarily liable on the instrument or if he is absent or inaccessible then to any person found at the place where the presentment is made. It must be presented at a reasonable hour on a business day.

(3) It must be presented at a proper place which is as

follows:

(a) Where a place of payment is specified the bill

should be presented at such place.

(b) Where no place of payment is specified but the address of the maker of a note or acceptor of a bill of exchange

is given then it should be presented at such place.

(c) Where no place of payment is specified and no address is given then it should be presented at the place of business of the maker or acceptor as the case may be, but if said maker or acceptor has no place of business then it should be presented at his residence.

(d) Where none of the preceding rules apply, then the instrument may be presented to the maker or acceptor wherever he may be found or at his last known place of business or residence. If the bill need not be presented for acceptance, then, presentment for payment must be made to

the drawee.

§ 361. When Presentment for Payment May be Dispensed With.— Presentment for payment is dispensed with, if, after the exercise of reasonable diligence presentment

cannot be made in accordance with the rules set forth in the next preceding paragraph. Presentment for payment may also be dispensed with if presentment is waived. In order to waive presentment for payment of all parties concerned the words "presentment for payment waived" or words to similar effect should be written across the face of the instrument. Any person secondarily liable on an instrument, may, if he chooses, waive presentment so far as he is concerned by writing the words "presentment for payment waived" above his signature.

§ 362. When Presentment Must Be Made.— When an instrument is payable on a certain date then it must be presented for payment at that time in order to hold the party secondarily liable. When an instrument is payable on demand presentment must be made a reasonable time after the issue (the putting into circulation) of the instrument except that in the case of a bill of exchange payable on demand, presentment for payment will be sufficient if made within a reasonable time after the last negotiation.

Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and is not imputable in any way to his own fault, misconduct or negligence. As soon, however, as the cause of the delay ceases presentment should be made with due

diligence.

§ 363. Notice of Dishonor; What Constitutes Notice of Dishonor.— Notice of dishonor is simply a statement either in writing or orally that a certain negotiable instrument, which must be therein described, has been dishonored by non-acceptance or by non-payment. When a notice of dishonor is duly addressed, stamped, and deposited in a postoffice or in a letter box, the sender is deemed to have given notice, notwithstanding any miscarriage in the mails.

§ 364. By Whom and to Whom.— Notice of dishonor may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay the value of the instrument to the holder, provided that the party giving the notice would thereby protect

his right to reimbursement from the party to whom the notice is given. Aside from a few exceptions, notice of dishonor must be given to all parties secondarily liable on a negotiable instrument and any such party not given notice is discharged from all further liability. The exceptions to the rule that notice must be given may be stated as follows:

(1) Notice may be waived by any party either orally or in writing. The usual method is to write the words "presentment, protest, and notice waived" thereby waiving the three rights which a party secondarily liable has. Sometimes, however, merely the words "notice waived" are written above his signature by a party secondarily liable. In the latter case notice only is waived as to such party.

(2) Notice is dispensed with by law when after due

diligence it cannot be given.

(3) Notice need not be given to a drawer if he has drawn the bill on himself or on his agent or if the drawee is a fictitious person or a person not competent to contract or if the drawer has no right to expect that the drawee will honor the bill or if the drawer has countermanded payment.

(4) Notice need not be given to an indorser on any negotiable instrument if the instrument was made or accepted

for the indorser's accommodation.4

#### **EXAMPLE:**

Allen wanted to borrow \$500. He induced his friend Baker to make a promissory note to Carter for \$500. Allen indorsed the note, whereupon Carter loaned the money to Allen. This note was made for Allen's accommodation, hence Allen would not be entitled to notice of dishonor.

- § 365. Contract of Indorser on a Negotiable Instrument.— An unqualified indorser's contract is of dual nature. First, he promises to pay the face value of the instrument to a subsequent holder in due course, provided the party primarily liable fails to pay and provided further that due pre-
- (4) A negotiable instrument is said to be drawn for a person's accommodation if the instrument was drawn in order to render him financial assistance.

sentment and protest be made and notice of dishonor be given when these are necessary and, second he makes certain warranties. These warranties may be stated as follows:

(1) That the instrument is genuine and is in all respects

what it purports to be.

That he has good title thereto.

That all prior parties had capacity to contract.

(4) That the instrument is valid and subsisting at the

time of his indorsement.

The contract of a qualified indorser is not of a dual nature. A qualified indorser does not promise to pay the instrument if the primary obligor defaults but he does make the first three of the warranties of an unqualified indorser stated above and he also warrants (4) that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. For the breach of any of these warranties he is accordingly liable to a subsequent holder in due course.

If the holder of a negotiable instrument transfers an instrument by delivery only he is liable in the same way as if he were a qualified indorser with this one exception: the qualified indorser's warranties extend to all subsequent holders in due course, but a holder who transfers by delivery is liable only to his immediate transferee.

§ 366. Order in Which Indorsers are Liable.— As respects one another, indorsers are liable prima facie in the order in which they indorse, that is, the first indorser is liable to a second indorser or to any subsequent indorser and the second indorser is liable to the third, etc. Evidence is admissible, however, to show that between themselves they have otherwise agreed.

§ 367. Irregular and Accommodation Indorsers.— Where a person not otherwise a party to any instrument places thereon his signature in blank before delivery he is called an irregular indorser. A person who signs as an irregular indorser does so in order to accommodate (that is to lend his credit to) some of the original parties to the instrument. Probably the reason for calling such an indorsement "irregular" is that it might be scratched out and yet the tally of indorsements would be complete.

#### **EXAMPLE:**

Allen made a promissory note to Baker for \$1,000. Carter then signed his name on the back of the note. Then Baker, who was payee of the note, signed his name under that of Carter. Baker then sold the note to Donald. Carter is an irregular indorser, for his indorsement is out of place and is not necessary to complete the tally of indorsements.

An accommodation indorser is one who indorses a note to render someone financial assistance, that is to lend his credit to the paper. From what has preceded in regard to an irregular indorser it will be seen that every irregular indorser is an accommodation indorser. It must now be stated, however, that every accommodation indorser is not an irregular indorser. An accommodation indorsement may appear in the regular tally of indorsements and may apparently be an indorsement for value.

#### **EXAMPLE:**

Allen wished to borrow \$1,000 from a bank. Inasmuch as his own credit was not good at the bank and inasmuch as his friend's, Baker's, credit was good, Allen asked Baker to appear on the note as an accommodation indorser. Baker agreed to do so, whereupon Allen drew a promissory note payable to Baker for \$1,000. Baker then indorsed the note in blank and then handed it back to Allen who presented the note at the bank for payment. In such a case Baker is an accommodation indorser.

An irregular indorser is liable to all holders in due course except as to those for whose benefit he signs. An accommodation indorser is liable to all subsequent holders in due course except as to those for whose benefit he has signed.

### VI. Discharge

§ 368. Instruments; How Discharged.— A negotiable instrument may be discharged in any one of the following ways:

(1) By payment in due course by or on behalf of the

principal debtor.

(2) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.

(3) By the intentional cancellation or suspension

thereof by the holder.

(4) By any other act which will discharge a simple

contract for the payment of money.

(5) By the fact that the principal debtor has become the holder of the instrument at or after maturity in his own right.

§ 369. Discharge of Those Secondarily Liable.— A party secondarily liable on the instrument is discharged in

the following manner:

(1) By any act which discharges the instrument.

(2) By the intentional cancellation of the signature of the party secondarily liable by the holder.

(3) By the voluntary discharge by the holder of a prior

party.

(4) By a valid tender of payment made by a prior

party.

(5) By any contract or understanding between the holder and a party primarily liable to extend the time of payment or to postpone payment unless the party secondarily liable consents to such agreement.

(6) Failure of holder to protest or give notice of dis-

honor when such be necessary.

§ 370. Effect of Material Alteration of Instrument.—When a negotiable instrument is materially altered by any party, who acquires or holds the instrument lawfully, without the consent of all the parties primarily liable thereto, such party so altering the instrument cannot recover thereon. He may also be liable in a criminal proceeding brought by the state. He is also liable on said instrument as altered in a civil action brought by any or all parties who acquire said instrument lawfully subsequent to said alteration and without notice thereof. But when an instrument which has

been materially altered falls into the hands of a holder in due course, such holder not being a party to the alteration, or having any knowledge thereof, he may not only enforce payment of the instrument as it stands in its altered form as against all parties making or assenting to the alteration and against all parties indorsing subsequent to the alteration and prior to his purchase of the instrument but he may also enforce payment according to the original tenor of the instrument against all parties to the instrument prior to the alteration.

What constitutes a material alteration? Any alteration is material which changes, first, the date; second, the sum payable, either principal or interest; third, the time of payment; fourth, the number or relations of the parties; fifth, the medium of currency in which payment is to be made. An instrument is also held to be materially altered if a place of payment is added when none is specified.

### **QUESTIONS**

I. What is the distinction between assignability and negotiability? Do you regard this distinction as important?

II. Give an original illustration showing the difference in the rights of persons who acquire assignable and negotiable instruments.

III. Give an illustration of a foreign bill of exchange and of a promissory note.

IV. Define the following terms and give an illustration thereof: a holder in due course, a restrictive indorsement, an indorsement in blank, a qualified indorsement.

V. What is the contract of a maker of a promissory note? Of an acceptor of a bill of exchange?

VI. Give an original illustration of a qualified acceptance. Suppose an acceptor qualifies his acceptance and the holder does not notify the indorser of the bill of the qualification. What effect does this have on the liability of the drawer?

VII. Allen drew the following bill of exchange: "\$10,000.00

New York City, N. Y., January 2nd, 1914. One day after date pay to the order of THOMAS CARTER

the sum of Ten Thousand Dollars, and charge the same to the account of

(Signed) JOHN ALLEN.

To Richard Baker,

New York City."

Must this bill of exchange be presented by Allen to Baker for acceptance? Must it be presented for payment? Would there be any legal objection to its presentment for acceptance?

VIII. Allen and Baker were partners. Carter drew a bill of exchange on Allen and Baker, payable to the order of Donald. Donald presented the bill for acceptance to Allen, who accepted it, but did not present it to Baker. Was this sufficient? State reasons.

IX. Allen drew a bill of exchange on Baker for one hundred dollars, payable to the order of Carter.

Before Carter could present the bill for acceptance Baker died. Was it obligatory on Carter to present this bill for acceptance, and if so, to whom should he present it?

X. Suppose Allen presents a bill of exchange drawn on Baker to Baker, and Baker refuses to ac-

cept it. What is this called?

XI. Allen drew a bill of exchange on Baker, payable to the order of Carter, in the sum of one thousand dollars. Donald indorsed the bill as an accommodation for Allen. Allen presented the bill to Baker for acceptance, but Baker refused to accept it. What should Carter then do? Why?

XII. Allen drew a bill of exchange on Baker, payable

to the order of Carter, for five hundred dollars. Baker wrote his unqualified acceptance on the face of the bill. When the time came for payment Baker refused to pay. Could Carter collect from Baker? Could he collect from Allen?

XIII. (A) Suppose no place for payment of a bill of exchange is given, but the address of the drawee is stated on the instrument. Where should the bill be presented for payment? (B) Give an original illustration showing that presentment for payment may be dispensed with.

XIV. Is delay in presenting a negotiable instrument for

payment ever excused?

XV. Give two illustrations of exceptions to the rule that notice of dishonor of a negotiable instrument must be given to all parties secondarily liable.

XVI. When is a negotiable instrument drawn for accommodation? Illustrate.

modation? Illustrate

XVII. What is the liability of a holder of a negotiable instrument who transfers it by delivery only?

XVIII. What is the liability of a qualified indorser? Give an original illustration showing the order in which various regular indorsers are liable.

XIX. State all the methods by which a negotiable instrument may be discharged. How is one secondarily liable on a negotiable instrument discharged?

XX. What is the effect of a material alteration of a

negotiable instrument?

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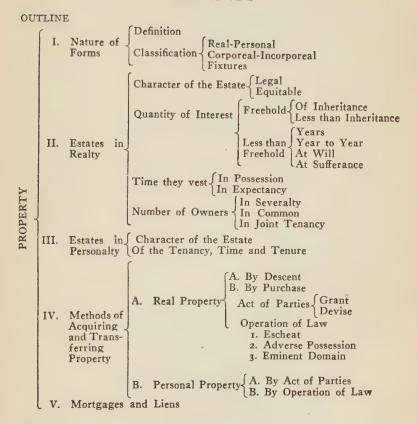
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### CHAPTER XXIII

#### **PROPERTY**



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#### Part I -- Nature and Forms

§ 371. Meaning of the Term "Property." - Broadly speaking the term "property" includes, first, any object which is capable of exclusive possession and, second, the right to use, enjoy, and dispose of such an object. "The term is, therefore, said to be nomen generalissimum (a most general name) and to include everything which is the subject of ownership corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal, choses in action as well as in possession,1 everything which has an exchangeable value, or which goes to make up one's wealth or estate." a In a more limited sense, however, the word "property" is used to designate only the right to use, enjoy, and dispose of an object, and not to include the object itself. Unfortunately, however, the word is sometimes used in its broad sense and sometimes in its strict sense in various legal documents and even in the same legal document, and, hence, its meaning can be determined only by ascertaining the connection in which, and the purpose for which, it is used.

Although most things which exist on earth are capable of exclusive use, enjoyment, and disposition and are, therefore, property, yet there are some things which cannot be classed as property. For example, the air, light, and ocean water are not property. They belong to mankind in common; they are not capable of exclusive enjoyment by any one in particular. But if an individual incloses a certain portion of air or ocean water in a receptacle which belongs to him, then, so long as he retains them in that receptacle, they are

his property.

§ 372. Classification and Definitions.— There are many

<sup>(</sup>x) The terms "choses in action" and "in possession" will be defined in the next section.

<sup>(</sup>a) 32 Cyc. 647.

possible classifications of property,2 but for the purpose of this work only two shall be considered: (1) Real and per-

sonal; (2) corporeal and incorporeal.

(1) Real and personal property have two meanings corresponding to the two uses of the word "property." The one meaning which we shall now consider has reference to the *objects* (both physical and those existing only in contemplation of the law) embraced in the term. The other meaning, which we shall consider in Part II of this chapter, designates the extent of the *right* and *interest* which one has in certain objects.

In regard to the objects embraced, real property is said to include lands, tenements and hereditaments. Professor Huffcutt in his work on "The Elements of Business Law" has given the following lucid statement of the meaning of these terms:

- "(a) Land comprehends the soil and those things annexed to it either by nature or by man, such as waters, trees, ores, houses, fences, etc. The land in contemplation of law extends downward to the center of the earth and upward to the highest heavens. Thus, one owning ten acres of
- (2) In the Roman law one classification of property was into movables and immovables; and it is sometimes said that our classification of real and personal property is based on the Roman classification mentioned. Although it is true that our personal property corresponds rather closely to the Roman movables and that our real property corresponds very closely to the Roman immovables, yet the terms "real" and "personal" were not selected, as were the corresponding terms of the Roman law, to designate the kinds of objects included in each class. "They were first applied to actions and were afterwards extended to property with the meanings that they had acquired in connection with actions. A real action was one brought for the recovery of the res - the thing itself; while a personal action had for its object the recovery of damages from some person for the breach of a contract or other obligation." The rule then came to be established that the only object for which a real action could be brought was land, while for all other property a personal action had to be brought. From this time on the term "real property" was used to designate land, while "personal property" designated every other kind of property. The terms are still used in much the same way, although the reason for their selection has long since disappeared.

land would have his possession defined by a pyramid with its apex at the center of the earth and with its sides passing through his boundaries indefinitely into space. Any one breaking into this pyramid or 'close' at any point is said to

be a trespasser.

"(b) The term tenements is broader than the term land, and includes not only lands, but also whatever else could be held under feudal tenure, such as easements in lands. If B owns tract X and C owns tract Y, C may acquire for the benefit of tract Y a right of way over tract X. C, therefore, owns lands (tract Y) and tenements (right of way over tract X). The modern use of the term 'tenement' to describe a building rented to tenants is to be distinguished

from this technical meaning.

"(c) The word hereditaments is the broadest of all, and includes whatever may be inherited by an heir from an ancestor. It includes not only lands and tenements but also heirlooms, such as an historic powderhorn, family jewels, etc. Heirlooms, while common in England, are not known to our law, and therefore hereditaments and tenements are substantially equivalent terms in the United States. Corporeal hereditaments or tenements are things material, such as lands, houses, etc.; incorporeal hereditaments or tenements are intangible rights arising out of material things, such as the right to collect rent out of lands, the right to exercise the franchise to maintain a toll bridge or a ferry, or the right to take ore out of another's land." b

The student need not feel any great concern if he does not fully grasp the meaning of the terms "tenements" and "hereditaments" inasmuch as they are of a purely technical signification. For practical purposes an understanding of

the word "land" is sufficient.

The phrase "personal property" with reference to the objects embraced includes chattels real and chattels personal. Chattels real include such interests as are annexed to, or concern, real estate, which, at the same time, do not pass

<sup>(</sup>b) Huffcutt on the Elements of Business Law, p. 271.

directly from ancestor to heir upon the death of the ancestor intestate and which also are not fixtures. Examples are

leases for a definite period of years.

Chattels personal include any and all tangible objects except land, tenements, and hereditaments, or things in connection with these. "Chattels personal are commonly called choses and are of two kinds: choses in possession and choses in action. A chose in possession is a chose of which the owner has the actual possession and enjoyment. A chose in action is a chose, to the possession of which the owner has a right, and yet of which he has not the actual possession." It is so called because an action at law may be necessary to reduce it to actual possession.

#### **EXAMPLES:**

I. Allen had \$40 in cash. This money is personal property—it is a chose in possession.

2. Allen owned and had possession of a horse and buggy and automobile. These objects are personal property — choses in possession.

3. Baker owed Allen \$400 for goods which Allen had delivered to Baker. Allen's *right* to recover this \$400 is personal property—it is a chose in action.

4. Baker struck Allen in the face without cause. Allen's *right* to recover damages for this assault is personal property—it is a chose in action.

(2) The second classification of property suggested is that into corporeal and incorporeal. Corporeal property simply means any tangible property; i. e., any object, which can be actually seen and touched. Thus, we may have corporeal real property and corporeal personal property.

Incorporeal property is not tangible. It "is that which has no substantive existence, but exists merely in contemplation of the law. It includes all rights to corporeal property, or to the use of such property." Incorporeal property

<sup>(3)</sup> The word "chose" is derived from the French word chose, meaning thing.

<sup>(</sup>c) Robinson on Elementary Law, § 153.

may be classified as incorporeal real property and incorporeal personal property. It is very difficult to define accurately the term "incorporeal real property." It has been said to consist of "certain permanent rights of enjoyment or profit in another's lands." Again it has been said to be any property "which is inheritable, but is not tangible." For all practical purposes we may say that incorporeal real property embraces all those permanent rights of an intangible nature which one person has in the land of another. By permanent rights is meant those rights which pass directly from the ancestor to the heir upon the death of the ancestor, intestate, that is without leaving a will. The most important of these rights recognized in the United States are commons, ways and easements.<sup>4</sup> Incorporeal personal property includes all transitory rights, whether relating to land or to chattels personal, as for example, the rights arising out of patents and copyrights.

#### **EXAMPLES:**

1. Allen owned a piece of land, known as Blackacre. He also owned an automobile. Blackacre was corporeal real property and

the automobile was corporeal personal property.

2. Allen owned a piece of ground on Washington Avenue in St. Louis. Baker owned an adjoining piece of land. Baker started to excavate his land and it became apparent that if he continued the excavation, all of Allen's lot would cave in. Thereupon Allen gave Baker notice that he must cease excavating, or he must find some means of supporting his (Allen's) land so that it would not

(4) Commons, or a right of common "is a right or privilege which several persons have to the products of the land or waters of another. Thus, commons of pasture is a right of feeding the beasts of one person on the lands of another."

A way "is the right of one man to pass and repass over the land of another

by some customary or designated path."

An easement "is the right of the owner of one parcel of land (Whiteacre), by reason of such ownership, either to use the land (Blackacre) of an adjoining owner for some special purpose not inconsistent with the general rights of the owner or to prevent such adjoining owner (of Blackacre) from using his land to the detriment of his neighbor (the owner of Whiteacre). Cf. Black's Law Dictionary: "Commons, Ways, and Easements."

cave in. Allen's right to have the lateral support of Baker's ground is incorporeal real property. It is called the easement of lateral

support.

3. Allen purchased of Baker, the owner of a certain patent, all of Baker's rights to said patent. Carter then infringed on the said patent. Allen's right to damages from Carter may be said to be incorporeal personal property.

§ 373. Fixtures.— The legal character of objects is likely to change without any actual change in the objects themselves. There are objects which are choses in possession and yet, which after annexation to land 5 are legally no longer personal property, but are classed as real property. Again, there are chattels, which, notwithstanding that they are fixed to land, are nevertheless still considered to be personalty.

#### **EXAMPLES:**

1. Allen, the owner of a house, ordered Baker, a plumber, to build a bathtub into the house. Before the bathtub was installed, it was a chattel personal—a chose in possession. After the bathtub was built into the house, it became a part of the land—corporeal real property.

2. Baker rented a store from Allen for the period of one year. Baker moved several showcases into the store in order to display his merchandise. The showcases were not fastened to the floor. The removal of the showcases would in no way have injured the building. These showcases would be considered personalty.

Any tangible property, which according to concomitant circumstances assumes the character of realty or personalty, is said to be a fixture. Although the term "fixture" has been used with various significations, it is always applied to objects of a personal nature which have been affixed to realty and the legal condition of which as realty or personalty is indeterminate. The law of fixtures may then be said to "deal with property whose status as realty or personalty is indeterminate until the proof of certain facts and

<sup>(5)</sup> The student must remember that the word "land" includes houses, etc.

the application of certain rules of law." d It is, of course, often a very difficult matter to determine whether or not an article so annexed is realty or personalty. The question usually arises between a vendor and vendee of realty after the sale has been closed, or between an outgoing tenant and his landlord, although difficulty may also arise in other cases. The party surrendering possession of realty will often want to take certain chattels with him which have been annexed to the freehold, and the party coming into possession will often demand that these chattels be not taken from the premises on the grounds that they have become a part of the real estate. In the case of the tenant, one way to avoid any such difficulty with the landlord is to have the landlord sign a stipulation, granting the power of removal, before the chattels are brought on to the premises. As for the vendor of realty, he may expressly stipulate at the time of the sale that he shall have power to remove from the premises certain chattels which are annexed to the land.

There are a number of rules which have been set forth from time to time as a partial guide to determine whether certain property is to be considered as realty or personalty in those cases in which no previous agreement covering the matter has been made. While somewhat out of place here, yet in order to avoid discussing the subject of fixtures again in this chapter, some of these rules will now be given:

(1) If the chattel is annexed 6 to the realty in such a manner that its removal would permanently or seriously injure the realty, such object should then be considered to be

a part of the realty.

(2) If the article may be removed from the realty without permanent injury to the realty, then, whether it shall be considered personalty or realty, depends upon the *legal* intention of the party making the annexation, this intention to be inferred from the following:

<sup>(6)</sup> The word "annexation" has been defined to be "the act of attaching, adding, joining, or uniting one thing to another; generally spoken of the connection of a smaller or subordinate thing with a larger or principal thing." Cf. Black's Law Dictionary: Annexation.

<sup>(</sup>d) 19 Cyc., § 1035.

(A) The nature of the article affixed.

The mode of annexation. (B)

- (C) The purpose or use for which the annexation was made.
- (D) The relation and station of the party making the annexation.

(A) If the chattels affixed to the realty be in the nature of articles which would ordinarily be considered part of the realty, as for example, fences, furnaces and the like, then they are usually held not to be removable. If, however, the chattels be in the nature of mere temporary articles, such as portable showcases and the like, then such articles are usually held to be removable.

(B) The mode of annexation is also very important. If the chattel be built into a place especially prepared for it, then, notwithstanding that it can be removed without permanent injury to the realty, yet such an article would probably be held to be a part of the realty, and therefore, irremovable. If, however, the chattel is merely very lightly attached to the realty and is placed haphazardly, then such an article would probably be considered a chattel personal, and therefore, removable.

(C) It is also of aid in reaching a decision to know the purpose for which the chattel was placed on the realty. If avowedly annexed for permanent benefit to the realty, the article would probably not be removable. If, however, merely annexed for temporary purposes, it would probably

be removable.

(D) The reader has no doubt noticed that the word "probably" has been used to qualify the statements in (A), (B) and (C). The reason for this is that these rules are not hard and fast, for they not only modify each other, but they are all in turn qualified by the station and relation of the party making the annexation. What would be considered a chattel, if annexed by a tenant, might well be treated as a part of the realty if annexed by the owner. If, for example, the owner built a chandelier into his house and

then sold the house, the chandelier would probably go with the house as part of the realty, notwithstanding that the chandelier could be removed without permanent injury to the house. If such a decision were made, it would be based on the presumption (inference) of law that if an owner built a chandelier into his house, he intended that chandelier to become a part of the realty. And any similar addition or annexation of a chattel to realty, if it is calculated to improve the realty and if it is made by the owner, may very properly be considered a part of the realty, notwithstanding that it might be removed without permanent injury to the realty. On the other hand, any annexation of a chattel to realty by a tenant or one temporarily occupying the land will ordinarily retain its character as personalty, provided the annexation was for purposes of trade or domestic convenience, and the removal of the chattel would not permanently injure the realty.

The parties may always contract what property shall be considered personal or realty and in that event they will be

bound by their contract.

In conclusion, it must be said that the law of fixtures is in an unsettled condition, the courts of one State often deciding entirely differently than the courts of another State upon the same statement of facts.

### Part II. Estates in Realty

§ 374. Definition and Explanation.— The reader will recall that in the paragraph on Classification and Definitions in Part I of this chapter the statement was made that real and personal property have two meanings; the one meaning designating objects (actual or existing in contemplation of the law), the other meaning indicating the extent of the right or interest one may have in certain objects. Under that same paragraph heading it was stated in reference to the physical objects designated that the term "real property" embraced lands, tenements and hereditaments; that in reference to the objects existing only in contemplation of the law, real property included what is technically known as incor-

poreal real property. It was also stated in reference to the physical objects considered that corporeal personal property included any and all tangible objects not embraced in lands, tenements, and hereditaments; and that in reference to the objects existing only in contemplation of law, personal property included what is technically known as incorporeal personal property.

It now becomes necessary for us to consider the second meaning of the terms "real" and "personal property," viz., the extent of interest one may have in certain objects. This extent of interest is called an estate. Broadly speaking, an estate is the interest which one has in any kind of

property.

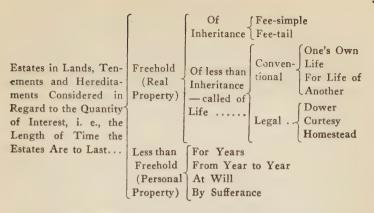
§ 375. Character of Estates.— The following is an outline of estates in land considered in reference to the *character* of the estate itself:

Estates in Land Considered in Reference { Legal to the Character of the Estate Itself Equitable

The law distinguishes between an estate in land and the benefits to be derived from the ownership of such an estate. One party may indeed have not only the possession of land, but also the right of possession, and another party may have the right to all the profits which come from such land. The party having the possession of the land and the right of possession is said to have the legal estate, and his estate is the only one which will be recognized in a court of law. The other man, however, who has the right to the profits which come from the land has what is called an equitable estate, and while his interest will not be recognized in a court of law, yet it will have full recognition in a court of equity. Equitable interests, rights and remedies have been referred to in a previous chapter.

§ 376. Length of Time Estates are to Continue.— The following is an outline of the principal estates one may have in lands, tenements or hereditaments, so far as the *length* of time which these estates are to continue is considered:

<sup>(</sup>e) Chapter I, § 8,



All these estates will now be defined and explained. Freehold estates are classed as real property and estates less than freehold are classed as personal property. Professor Robinson makes the following statement in regard to this: "Human life, being of uncertain and unascertainable duration, is presumed by law to be permanent and without end. An estate for life possesses the same legal character, and is, therefore, held to be of a higher order than any estate, the period of whose existence can be ascertained no matter of how many years that period may consist. An estate granted for a thousand years is thus, in law, a less estate than one granted for life, however certain it may be that the former will outlast the latter, and no estate is greater, in law, than an estate for life except one [group, i.e., estates in fee-simple and in fee-tail. ] which is so created that it will exist during the lifetime of the tenant, and, after his death, descend to his heirs. From these principles arises the first great division of estate in real property [i. e., in lands, tenements and hereditaments, into freehold estates, and estates less than freehold; freehold estates including life estates, and inheritable estates; estates less than freehold including all estates for fixed periods of time, and all estates, the periods of whose duration may be determined or can be ascertained at the time when the estate itself is created." f

<sup>(</sup>f) Robinson on Elementary Law, § 69.

§ 377. Freehold Estates of Inheritance Defined.— The highest estate known to the law is the fee-simple. It is an estate granted to a person and his heirs in general, that is, both collateral, as well as lineal heirs. An estate in feetail is an estate granted to a person and his lineal heirs, that is, the heirs of his body. Estate in fee-tail have been abolished in most of the states of the Union.

#### **EXAMPLES:**

- 1. Allen made a deed of Whiteacre to Baker, which deed read in part that Allen did grant, bargain, and sell said Whiteacre to Baker, and to his heirs in fee-simple. This would be a grant in fee-simple, or as it is sometimes called "in fee."
- 2. Allen made a deed of Whiteacre to Baker, in which he did grant, bargain, and sell said Whiteacre to Baker and the heirs of his body only. This was a deed in fee-tail, or as it is sometimes called "an estate tail." Cf. Hulburt v. Emerson, 16 Mass. 241.

Freehold estates less than inheritance are called life estates. Life estates are in turn divided into conventional estates and legal estates. Conventional life estates are those created by deed or will.

### **EXAMPLES:**

- I. Allen, who owned the land, Whiteacre, in fee-simple, made a deed, granting to Baker, his nephew, the use and enjoyment of Whiteacre as long as he (Allen) lives. Upon the death of Allen, the estate was to pass from Baker to Carter. This was a conventional life estate, technically called an estate per autre vie, meaning an estate to endure as long as some certain person, other than he to whom the estate is granted, lives.
- 2. Allen granted an estate in land to Baker, said estate to last as long as Baker lives. This is also a conventional life estate, technically called an estate during the life of a tenant or occupant.
- (7) The lineal heirs of a person are those who are descended from him in a direct line, such as his children and grandchildren. Collateral heirs are those heirs who are descended from a common stock with the deceased person and are not descended from one another; as brothers are collateral heirs, for they have common ancestors. So cousins are collaterally related, for they have at least one common ancestor, a grandfather or grandmother.

Legal life estates are those estates for life which are created by law. They are technically called dower, curtesy, and homestead. "Dower is the right of a wife to the life enjoyment, after the husband's decease, of one-third of any estate of inheritance of which the husband was seized at any time during the coverture, provided it was such an estate that her issue (children) had she had any, could have inherited, and provided further she did not legally release her rights."

Curtesy is the right of a husband to the life enjoyment, after the widow's death, to all the estates of inheritance of which the wife was seized at any time during the coverture, provided it was such an estate, as her issue could have inherited, and provided further that issue, capable of inheriting, was born alive as a result of the marriage, and provided still further that the husband did not legally release his right to curtesy.

Homestead means the place where the home is located. It is the home — house and the adjoining land — where the head of the family dwells.

- § 378. Estates Less Than Freehold.—There are four estates less than freehold which we will briefly consider, viz., estates for years, from year to year, at will, and by sufferance. These estates are called chattels real. They are considered personal property. An estate for years is an estate in lands, which is to last for a stipulated period of time, as an estate for three months after January 1, 1911. It will be seen that in this connection the word "years" is not used in its ordinary sense, but is used to denote any definite
- (8) "The possession of corporeal real property by one who has a free-hold estate in his name is seizin. Seizin is of two kinds: seizin in fact, and seizin in law. Seizin in fact is the actual occupation of the land either by the freeholder himself, or by some one claiming under him. Seizin in law occurs where no one is in actual occupation of land; as where an ancestor has died, leaving lands vacant. The seizin, in such case, is presumed by law to be in him who has the freehold interest, and may at any time be converted by him into seizin in fact." Robinson on Elementary Law, §§ 72 and 74

(9) Coverture is here broadly used to mean marriage.

period of time. It is usually created by a contract called a lease, the one renting the land being called the lessor and the one to whom the land is rented being called the lessee.

An estate from year to year is an estate in lands from one definite period to another definite period and which estate automatically renews itself, unless proper notice to terminate the estate is given. This estate differs from an estate for years so far as duration of time is concerned, only in that at the end of the time for which the estate for years was created the lessor has a right to the possession of his premises without giving any notice to the lessee to vacate the premises, while if the estate was from year to year, then the landlord must give the tenant the notice required by law, and so also the tenant must give the landlord notice if he desires to quit the premises. Thus, an estate from week to week, from month to month, from quarter to quarter, or from year to year (using the word in its popular sense to mean twelve months) are all called in law estates from year to year.

An estate at will is an estate in lands which may be terminated at the will of either party. This class of estates is not favored by the law, and whenever such an estate can be considered as an estate from year to year, it will be so treated.

An estate by sufferance is a so-called estate which one has who wrongfully continues in possession of land after the legal estate, by virtue of which he obtained rightful possession, has terminated. It is the so-called estate which arises when a tenant <sup>10</sup> remains in possession of land without the consent of the owner at the end of the period for which he rented the land.

§ 379. Time When Estates Vest.— The following is an outline of estates in land considered in regard to the time when the estates are to begin to be enjoyed:

(10) In a restricted sense of the term, a tenant is one who has the temporary use and occupation of lands owned by another person called the landlord, the terms of the occupation being usually fixed by the instrument called the lease. Cf. Black's Law Dictionary.

Estates in Land Considered in Regard to the Time They Are to Vest, that is the Time They Are to Begin to Be Enjoyed In Expectancy Reversion Executory Devise

Estates in regard to the time when they are to vest, that is, when they are to begin to be enjoyed, are of two kinds: Estates in possession and estates in expectancy. "An estate in possession is one which is so created as to vest in the owner thereof a present right of present enjoyment. An estate in expectancy is an estate so created that the enjoyment thereof is postponed until some future day." Estates in expectancy are of three kinds: Estates in remainder, estates in reversion, and executory devises. An estate in remainder is an estate limited to take effect in possession in the future after the expiration of another estate which is created for a certain period of time (less than a fee) in the same instrument and which is to take effect in possession immediately.

An estate in reversion is the residual estate which remains in a grantor after he grants away an estate less than the whole of his own. An executory devise is an estate erected by will to commence at some future time without reference to any proceeding or intermediate estate.<sup>h</sup>

# **EXAMPLES:**

 Allen granted Whiteacre to Baker and his heirs to have and to hold forever. This was an estate in possession.

- 2. Allen had a fee-simple estate in Blackacre. In consideration of the sum of \$10,000, Allen granted Blackacre to Baker for his (Baker's) life. Baker's estate would be an estate in possession. But inasmuch as Baker received only a life estate in Blackacre, upon his (Baker's) death the estate would revert to Allen or, if Allen were dead, then to Allen's heirs. Therefore, Allen has an estate in expectancy. It is an estate in reversion. Cf. Cook v. Hammond, 4 Mason 485.
  - 3. Allen owned a fee-simple in Whiteacre. He made a deed

(g) Robinson on Elementary Law, § 105.

(h) Cf. Robinson on Elementary Law, § 106; also Tiedeman on Real Property, Chapters XI, XII and XIV.

in which he granted Whiteacre to Baker and his heirs for 50 years. Allen further specified that at the end of the 50 years the estate should then pass to Carter and his heirs forever. In this case Baker would have an estate in possession. Carter, however, has an estate in expectancy. It is an estate in remainder. Carter or his heirs could not take possession of Whiteacre until the end of the fifty years, nor would the estate pass to them until such time.

- 4. Allen, who owned Blackacre in fee-simple, made a will in which he ordered that thirty years after his death the fee-simple to Blackacre should go to Baker or his heirs. Baker would then have an executory devise in Blackacre, that is, an estate granted by will to vest in the future. Cf. Brattle v. Grant, 3 Gray, 161.
- § 380. Number and Relation of Occupants.— The following is an outline of the estates in land in reference to the number and relation of their owners.

Any estate in land may be held either by one person or by two or more persons. The most common estates are those said to be held in severalty, that is, estates, both the ownership and possession of which are vested in one person only. The three principal estates held concurrently are estates in common, or estates in joint-tenancy, and estates by entirety.

An estate in common is said to exist when two or more persons hold undivided interests in the same real property under an instrument or instruments which show an intention that their interests shall be held independently of each other. Another definition is as follows: "An estate in common is an estate vested in one person, but the possession of which is united with that of other estates held by other persons, in the same property."

An estate in joint-tenancy is created when two or more persons are given an estate in real property jointly, that is, in the same instrument and with the stipulation that one estate only is created and that the parties mentioned shall hold this one estate together. Inasmuch as all the grantees receive the right of possession and the possession of such an estate at the same time, from the same grantor, and in the same instrument, there is said to be a unity of estate, title, time, and possession. The characteristic of such an estate is that at the death of one of the grantees the living grantees acquire all the deceased person's interest. This goes on until there is but one survivor and he then has the whole estate and it passes to his own heirs upon his death. In estates in common, however, upon the death of one of the grantees his own heirs take his interest, notwithstanding that all the other grantees are alive. In several of the States of the United States statutes have been passed declaring that all joint-tenancies shall be considered tenancies in common.

An estate by entirety is created when a husband and wife are jointly given an estate in real property in the same instrument. Each then has an undivided one-half interest in the estate and upon the death of one the estate vests absolutely in the survivor.

#### **EXAMPLES:**

1. Allen owned a freehold interest in Whiteacre in his own right. Allen had an estate in severalty.

2. In Allen's will it was specified that he devised Blackacre to Baker, Carter, and Donald in common. Each of the three devisees are then said to take an estate in common,—they have an undivided one-third interest in Blackacre. Upon the death of any one of the three, such deceased person's interest passes to his own heirs.

3. Allen devised Whiteacre to Baker, Carter, and Donald jointly. This was an estate in joint-tenancy. If Baker died his interest in the land would pass to Carter and Donald. If Donald died his interest would then pass to Carter; then if Carter died his interest, which by that time would be the whole interest, would then pass to his own heirs.

If there was a statute in the State in which the property was situated, however, which specified that all estates in joint-tenancy should be considered to be estates in common, then upon Baker's death his property would pass to his own heirs. Likewise upon Donald's

death his interest would pass to his own heirs, and so also in the case of Carter. Cf. Nichols v. Denny, 37 Miss. 59.

4. Allen deeded Whiteacre to John Allen and Mary Allen, his

wife, in fee simple. This created an estate by entirety.

- § 381. Landlord and Tenant Defined.— In the ordinary meaning of the term a landlord is one who owns land which he rents out to some other person called a tenant. When the phrase "landlord and tenant" is used, it denotes a relationship existing between two or more persons by virtue of a contract, expressed or implied, whereby one person, called the tenant, acquires the possession of lands either for years, from year to year or at will, through another person, called the landlord. When an express contract is made between the landlord and tenant, the instrument is called a lease. In such case the landlord is called the lessor and the tenant, the lessee. In order that a lease may be binding, it must contain all the essentials which every binding contract must contain. The parties may insert in a lease such warranties as they wish to become a part of the contract.
- § 382. Rights and Remedies of a Landlord.— One of the most important rights of a landlord is to receive the rent at the time stipulated. If the tenant refuses or fails to pay the rent, the landlord may

(1) Sue him for the money due;

(2) Sue the tenant in ejectment, that is, sue to have the officers of the law put the tenant off the land and permit the landlord to retake possession of the land. The landlord also has the right to see that the tenant does not wilfully injure the premises or does not make any changes in the buildings on the premises without the landlord's consent unless the lease gives such right to the tenant.

(3) Re-enter and take possession of the premises, if such right is reserved in the lease or is granted by statute.

§ 383. The Landlord's Duties.— The landlord must notify the tenant if there are any secret defects on the premises whereby the life of the tenant might be injured, provided the landlord knows of such defects. The landlord

must also make repairs on the land and buildings provided he agrees to do so. The landlord must also not disturb the tenant in his possession of the property. It is a further duty of the landlord to see that the tenant is not legally deprived of his possession of the property by someone else holding a superior title to the land and if the tenant is legally ejected by any third party holding a superior title to the landlord, then the landlord may be liable to the tenant for breach of contract.

§ 384. Rights and Remedies of a Tenant.—Some of the rights of the tenant have been given in the last two paragraphs. The tenant has the further right of assigning or sub-letting 11 the premises to some third party, provided there is no provision in the lease restricting or withdrawing such right.

#### **EXAMPLE:**

Allen leased a piece of property for twenty-five years to Baker. Baker sold his entire interest in the lease to Carter. This was an assignment. If Baker had given Carter an interest for ten years only, this would have been a sub-lease.

- § 385. Duties of a Tenant.— Aside from a tenant's duty to pay rent, and not to injure the premises, or remodel them in any material manner without the consent of the landlord, the tenant has the further duty to return the premises to the landlord in substantially the same condition in which he received them, ordinary wear and tear excepted, unless there is a condition in the lease to the contrary. The tenant must also comply with all the covenants he makes in a lease if one is made.
- § 386. Termination of a Lease.— The most important ways of terminating a lease are as follows:
- (1) The expiration of the time for which the lease was made.
- (11) When a lessee grants his whole interest in the land to some third person it is called an assignment. When the lessee grants merely a part of his interest in the lease it is called a sublease.
  - (i) Cf. Robinson v. Perry, 21 Georgia 183. 16 R. C. L. § 323.

(2) The surrender of the lease before the time has ex-

pired, provided the landlord accepts such surrender.

(3) The breach of covenant by the tenant provided there is a stipulation in the lease that it shall be terminated *ipso facto* (by that act) upon the breach by the tenant of such a covenant.

(4) Statutes in some States declare that the lease shall be terminated provided the buildings on the land are destroyed without the fault of the tenant.

# Part III. Estates in Personalty

§ 387. Character of the Estate.— Considered in regard to the character of the interest, estates in chattels are of two kinds: absolute and qualified. One who has an absolute estate in chattels has an unqualified interest in such an estate. He may, it is true, own the chattel in connection with two or more heirs, but in his own share he has an unlimited interest. One who has a qualified estate, however, has an interest which is not permanent. His ownership is qualified; his interest in the chattel is limited.

## **EXAMPLES:**

1. Allen owned a horse and buggy which he had bought and paid for. Allen owned an absolute estate in the horse and buggy.

2. Baker was a bailee of a horse and buggy which belonged to Allen. Allen would have an absolute estate in the horse and buggy. Baker, however, would have merely a special interest in the property, that is, a qualified estate.

§ 388. Of the Tenure, Time, and Tenancy in Chattels. — A chattel, whether real or personal, is not inheritable, and no estate in fee, as such, can be created therein. The absolute ownership of a personal chattel is, however, analogous to an estate of fee-simple in lands, and the person having such ownership may grant to another an estate in such chattel, for life, for years, or at will. Particular estates, with remainder following, may also be created in chattels personal, wherever the use of such chattels does not consist in their consumption. Estates in chattels per-

sonal may also be held in severalty, joint-tenancy, or in common, in the same manner, and subject to the same general rules, as in estates in real property.

# Part IV. Methods of Acquiring and Transferring Property

§ 389. In General.— Having considered the nature and qualities of the important estates one may have in real and personal property, it now behooves us to speak of the means by which estates may be acquired, held, or transferred, which in legal terminology is called "the title."

# A. Methods of Acquiring Title to Real Property

§ 390. Methods Named.— Title to land may be acquired in two ways, namely, by descent and by purchase. The reader's attention is called to the fact that these terms are used in a purely technical sense and that their meaning does not correspond to the ordinary signification of the words.

§ 391. Title by Descent.— When an owner of land dies intestate, that is without leaving a will, the title to the land passes to certain persons.<sup>12</sup> The persons who have a right to the lands of a deceased person are called his heirs-at-law or merely his heirs. Title by descent, then, is the title by which an heir acquires his estate direct from his ancestor.

Statutes in the various States provide who shall be considered heirs and in what order they shall inherit. The general plan of these statutes seems to be as follows: The lineal descendants of the deceased person, that is, those persons who descend in a direct line, such as his children and his grandchildren, shall have the first right to the land. There being no lineal descendants, then the father, mother, brothers and sisters, and the lineal heirs of the deceased brothers and sisters, are usually next in order. There being none of the above-mentioned persons living, then the uncles, aunts, and their descendants inherit.

<sup>(12)</sup> Those related either by blood or marriage to the deceased person.

The reader will no doubt have noticed that nothing is said about the wife or husband in the outline of the statutes just given. He must not forget, however, that the wife has a right of dower and the husband has the right of curtesy. In some States a wife or husband is respectively given the privilege of accepting a share in the estate equal to the share of a child in lieu of dower or curtesy.

#### **EXAMPLES:**

I. Mr. and Mrs. John Allen had born to them during lawful wedlock three children, namely, Thomas, Richard and Mary. Mrs. John Allen died. Mary married and had two children, namely, William and Henry. Then Mary died. Then Mr. John Allen died intestate.

The children and grand-children then inherit as follows:

Thomas and Richard would each get one-third interest in the realty of Mr. John Allen, their father. William and Henry, the children of Mary, would get Mary's share, that is, they would each get one-sixth interest in the real estate, thereby giving them together a total of one-third of Mr. John Allen's estate.

together a total of one-third of Mr. John Allen's estate.

2. Mr. and Mrs. John Allen had born to them in lawful wed-lock two children, namely, Thomas and Richard. Mr. John Allen died intestate. In a State in which the wife may repudiate her dower interest and may take an estate equal to that of her children, Mrs. John Allen could take a fee-simple interest in one-third of the realty of her husband, and each of the children, Thomas and Richard, would likewise get a fee-simple in one-third of the realty of their father.

- § 392. Title by Purchase.— Title by purchase is any other title than that by descent. Thus if a person dies and leaves a will, devising his lands to a relative or to a friend, such relative or friend gets title by purchase. Again, if a party buys lands, he gets a title by purchase. Title by purchase may be said to be of two kinds: Title by operation of law and title by act of the parties.
- § 393. Title by Operation of Law.— "Title by operation of law is a title by which a person acquires an estate either through operation of law alone, acting suo motu, 13

<sup>(13)</sup> Suo motu means of its own motion, that is without the precedent act of one of the parties.

or through the operation of law, acting with reference to some precedent act of one of the parties. Title by act of the parties is a title whereby a person acquires an estate which has been voluntarily transferred to him or created in his favor, by another, and voluntarily accepted by himself." i

§ 394. Title by Escheat, Adverse Possession, and Eminent Domain.— There are many ways of acquiring title by operation of law but we shall consider only three of these, namely, title by escheat, adverse possession, and eminent domain. If a party dies intestate and without lawful heirs, his lands revert to the State from whom theoretically, at least, all owners have originally derived their title. The title which a State acquires in such cases is said to be title by escheat.

What was known at common law as title by adverse possession was that title which one acquired who was in possession of the lands of another person for a certain length of time and under certain conditions. The conditions usually prescribed were that the claimant must have had the actual, visible, continued, uninterrupted, definite, exclusive, adverse possession of the land for a long period of years—twenty or more—under a claim that he had a fee-simple interest in the land. By these terms was meant the follow-

ing:

The person claiming the title must have actually occupied the lands or the person under whom it was held must have done so; the possession must have been visible or well known, but any open or notorious act which clearly showed an intention of taking possession of the land was sufficient; the possession must have been for the entire period of time either by the same person or, in some States, by various persons claiming under each other; there must have been no breaking in on the possession by the person holding the rightful title. The limits of the territory covered must have been clearly defined; there must have been no third person who was claiming to be holding the actual possession of the

<sup>(</sup>j) Robinson on Elementary Law, § 127.

same lands at the same time; the one claiming the title by adverse possession must have been holding an adverse or hostile interest to the real owner and he must have held under an avowal that he had the fee-simple title to the land.

In the various States so-called Statutes of Limitations have been passed, which statutes indicate that after a certain period of years, one shall lose his right to bring a suit to recover the possession or value of lands which have been and are being held in adverse possession by some other person.

There are often occasions when a State or a public service corporation, such as a railroad, needs for their purposes certain lands which are owned by a private person who refuses to sell. In such case the State, or when so allowed by statute, the public service corporation may institute what is known as a condemnation proceeding, whereby the private individual is compelled by the law to sell his land. A Board or Committee is usually appointed to fix the value of the land, which amount the individual must be paid. The title which a State or public service corporation acquires after such proceedings is said to be title by eminent domain.

§ 395. Title by Act of the Parties.— Title by grant and title by devise are the two ways in which one may acquire a so-called title by act of the parties. Title by grant is a title which one acquires in lands from the State, a corporation, or a living human being acting voluntarily. Title by devise is the title which one acquires in lands of a deceased person because of a provision in his will.<sup>14</sup>

§ 396. Public and Private Grants.— Title by grant which one acquires from a State is said to be a public grant. A title by grant which one acquires from a corporation or a living individual, acting voluntarily, is said to be a private grant. The instrument by which one acquires title by pri-

<sup>(14)</sup> A will is an instrument in writing duly executed in the form required by law, whereby a person directs the manner in which his property shall be disposed of after his death. The term "testament" is now used as synonymous with the word will, although it was formerly employed to indicate a will in which only personalty was bequeathed.

vate grant is said to be a deed. A deed may be defined as a written contract, signed, sealed and delivered whereby one person conveys to another lands, tenements, or hereditaments. The one conveying the property is called the grantor; the one to whom the property is conveyed is called the grantee.

§ 397. Requisites of a Valid Deed.— In order that a deed may be held binding in a court of law it must comply with the following requirements:

(1) The grantor and grantee must be parties competent

to contract.

(2) There must be an offer and an acceptance.

(3) They must give their real assent.
(4) The sale of the lands, tenements or hereditaments,

must not have been forbidden by law.

(5) It is necessary in a few States that there be either a valuable or a good consideration to support the deed. In the majority of States, however, if it is clearly shown in the deed that the grantor meant to convey both the legal title and the equitable title, that is, the use of the property, to the grantee such a covenant will be valid although not supported

by a consideration.

(6) There must be a sufficient writing. This includes the following: The deed must be written on some substance in which erasures and interlineations are easily detected, preferably upon paper or parchment. It should preferably be printed, typewritten or written in ink. The instrument should contain a contract complete in all its essentials before it is delivered to the grantee. The writing should clearly manifest the intention of the parties and should be unambiguous.

The instrument should be signed by the grantor. If he cannot write he should make a mark (x) and his name should be written around the mark by some other person.

(8) In most States it is necessary that a deed be under

seal.

(9) In some States it is necessary that the instrument be attested. By attestation is meant the act of writing one's name at the bottom of the deed or other written instrument as a witness, thereby indicating that one has either actually witnessed the signing of the instrument or that the person signing the instrument has said that the signature was his own to the one signing as witness.

(10) In some States it is necessary that a deed be acknowledged. Acknowledgment is the act by which a party who has executed a deed or other covenant as grantor, goes before an officer authorized by law (usually a notary) and declares or acknowledges that the instrument is his own (grantor's) genuine and voluntary act.

(11) It is extremely essential to the validity of a deed that it be delivered by the grantor or his lawful agent and that it be accepted by the grantee or his lawful agent.

(12) A deed should be recorded in accordance with the statutes of the State in which the land is situated. "The object of recording a deed is to furnish a subsequent purchaser with reliable means of investigating the titles." It must be recorded in the county or city (if the city be in no county as in the case of St. Louis) where the land lies.

§ 398. Component Parts of a Deed.— A deed may contain many parts, the most important ones being as follows:

(1) The premises, which should state the names of the parties, the description of the land and the words of conveyance.

(2) The habendum, which is a statement of the estate

granted.

(3) The reddendum, which sets forth any matters reserved by the grantor, that is, not granted to the grantee.

(4) The conveyance or warranties, if any. By conveyance or warranties, as here used, are meant those statements in a deed whereby either of the parties pledges himself to the other party that something is done or shall be done, or stipulates the truth of certain facts.

(5) The conclusion, stating that the grantor has signed

the instrument together with his signature.

(6) Whenever statutes of a State require a seal, attesta-

(k) Tiedeman on Real Property, § 580.

tion, or an acknowledgment clause, then such requirements should be fulfilled.

§ 399. Warranty and Quit-Claim Deeds.— Deeds may be said to be of two kinds, warranty deeds and quit-claim deeds. In a quit-claim deed the grantor simply conveys whatever title he may have and he does not profess that such title is valid. In a warranty deed the grantor likewise conveys whatever title he may have but he also covenants and warrants that he is seized of the land, that he has a right to convey such land, that his title is not encumbered in any other manner than that specified in the deed, that the grantee and his heirs shall have and enjoy quiet possession of the land, that is, possession undisturbed by one having a superior title to the grantor, that the grantor will warrant and defend the grantee in his quiet possession, and that the grantor will execute any further instruments necessary to perfect the grantee's title.

By statutes in some States if a deed contains certain words, such as "grant, bargain and sell," these words are held to

imply that the instrument is a warranty deed.

§ 400. Title by Device; Wills.— The terms "will" and "title by devise" have been defined in a previous para-

graph.15

The terms, "testator," "testatrix," "devisee," "legatee," "devise," "bequest" and "codicil" remain to be defined. The maker of a will, if a man, is called a testator; if a woman, a testatrix. The one to whom realty is devised is called a devisee. The one to whom personalty is bequeathed is called a legatee. A devise is a gift of realty and a bequest is a gift of personalty. A codicil is a supplement to a will.

§ 401. Some Facts About Wills.—With one or two minor exceptions all wills must be in writing and must be signed by the testator. If he cannot write, he must make

<sup>(15)</sup> In a will title to personalty may be acquired as well as title to realty. For the sake of economy of space we will treat in this heading the title acquired both to personalty and to realty.

<sup>(1) § 395,</sup> Note 14.

his mark (x) and then someone else must write the testator's name around the mark. It should be the endeavor of the person making the will to state what disposition he desires to make of his property in the clearest possible manner. In most States it is necessary that the testator should declare in the presence of a certain number of witnesses (usually two or three) that the instrument is his last will, and the witnesses must then attest the will.<sup>16</sup>

The general rule is that any person of sound mind and of legal age can make a valid will. In accordance with this, idiots and insane persons cannot make valid wills. By the statutes of the majority of the States of the Union, a person under twenty-one years of age cannot make a valid will. In a few States, however, the statutes provide an earlier age at which a valid will can be made.

Inasmuch as wills are of no effect until the death of the testator, he may change or revoke the will at his pleasure. In many States there are statutes providing the manner in which a will may be revoked. The most effective method is for the testator to burn or destroy the will. In some States, however, the marriage of the testator will ipso facto revoke the will.

# B. Methods of Acquiring Title to Personalty

§ 402. Methods Named.— Title to personalty may be acquired by operation of law and by the acts of the parties.

§ 403. Title by Operation of Law.— Title by operation is that the title which a person acquires in personal property because of the operation of the law. Thus if a person dies intestate having only personal property the legal title to such

(16) To attest a will is to certify in writing on the will or on a piece of paper attached to the will that the deceased declared the instrument to be his last will and that he stated it was his signature to the document or that they (the witnesses) saw the testator sign the instrument. The form usually employed for such an attestation is as follows:

On this the second day of January, 1909, the above-named testator signed and sealed this instrument and declared same to be his last will; and that in his presence, and at his request, and in the presence of each other, we do hereunto subscribe our names as witnesses.

personal property vests automatically, for a temporary period, in the executor or administrator of such deceased person, which is called "title by intestacy." Again if a person is sued in a tort action for the value of certain property which he has in his possession and if a judgment is rendered against him, which he pays, the title to the property then vests by operation of law in the one paying the judgment. And so also when a person gets a title to personal property which at the time of the acquisition does not belong to the State or to some other person in the community such title is said to have been acquired by original acquisition through operation of the law. This title may be obtained through occupancy, accession or intellectual production. These terms will now be explained.

Occupancy is a mode of acquiring personal property by which a thing not belonging to anyone exclusively becomes the property of the person taking possession of it with the

intention of acquiring the right to ownership.

#### **EXAMPLE:**

Allen grew tired of an old hat which he had been wearing, so he threw it away. Baker found the hat and took possession of it intending to keep it. Baker acquired the title by occupancy, which it will be remembered is one of the three ways of acquiring title by original acquisition.

Title by accession is that title which one acquires to everything which one's own property produces or which is added to one's own property by natural or artificial means.

### **EXAMPLE:**

Allen owned a cow. Allen loaned the cow to Baker. During the period in which the cow was in the possession of Baker, it gave birth to a calf. This calf would be the property of Allen, inasmuch as it is the natural product of Allen's property. This is title by accession which is the second method of acquiring title by original acquisition.

"The general doctrine in regard to proprietary rights in

the products of intellectual labor is, that everyone has a natural right to, and dominion over his own ideas and the fruits of his brain work; he may keep them to himself or impart them to others at his option, but when once voluntarily published by him in the absence of statutory provisions for their production, they are beyond his control, and become the property of the public, and equally available to all. Hence, for the purpose of promoting science, encouraging literature, and stimulating inventions, legislation is invoked, by which the natural rights of authors and inventors are protected, and at the same time the public benefited by their genius." <sup>17</sup> "The title which one acquires through patents and copyrights may be very properly called title by original acquisition through one's intellectual labor." <sup>18</sup>

§ 404. Title by the Act of Parties.— When a person gets the title to personal property from someone else, who has a valid title thereto, the title may be said to be acquired by the act of parties, for example, through a purchase, a gift,

or a will.

#### **EXAMPLES:**

1. Baker bought a book from Allen. Baker acquired title by purchase.

2. Allen gave his friend, Baker, a violin. Baker accepted the violin. This was a gift which was acquired by the act of parties.

3. Allen died, leaving a will in which he bequeathed ten of his horses to Baker. Baker accepted the bequest. Baker acquired his title by will, which is one of the ways of acquiring title by the act of parties.

# Part V. Mortgages and Liens

§ 405. In General.— The subjects of mortgages and liens have been reserved for the last topics to be discussed under modes of acquiring and conveying property, for the reason that the whole interest in property is really not meant to be transferred by a mortgage or a lien.

(17) Professor Smith is here referring to the Patent and Copyright Legislation. Cf. Smith on the Law of Personal Property.

(18) The subject of patents and copyrights will be treated in Chapter XXIII.

§ 406. Mortgages.— A mortgage of land is a conveyance of land as security for the performance of some obligation (usually called the payment of a debt) with a provision, called a defeasance clause, that the conveyance shall be void upon the performance of the obligation. The one giving the mortgage is called the mortgagor and the one to whom the mortgage is given is called the mortgagee. From the original reading of a mortgage one would think that it was a deed, were it not for the fact that the defeasance clause is added at the end. A mortgage should be executed with all the formality required for a deed and it should also be recorded just as a deed is recorded. If the obligation, to secure which the mortgage is given, is a debt of money, it is customary that the mortgagor also make out a note for the amount due.

The mortgagor must promptly fulfill the obligation to secure which the mortgage was given. If he fails to do so the mortgagee has a right to foreclose the mortgage. To foreclose a mortgage means to take possession of the mortgaged property legally, sell it, apply the proceeds of the sale to the fulfilment of the obligation for which the mortgage was given, and if there is any surplus, then to pay such surplus over to the mortgagor.

The subject of pledges of personal property, or, in other words, mortgages of personal property was considered in

the chapter on Bailments."

§ 407. Liens.— A lien on lands is a qualified right which a creditor has in them for the performance of some obligation. From this definition it will be seen that a mortgage may in one sense be termed a lien. A judgment obtained against a party in a federal court is a lien on all his lands, situated in the State in which judgment is rendered; a judgment in a State court is a lien on the lands of the party against whom the judgment is docketed, in the county in which it is rendered or in any other county in the State in which a transcript of the judgment is filed. In most States unpaid taxes create a lien in favor of the State against the

<sup>(</sup>m) Chapter XVIII.

land on which the taxes are due. The statutes of the States provide for the creation of certain liens, such as mechanics' liens which are liens in favor of unpaid mechanics who have performed labor upon the buildings.

There also may be liens on personal property, that is, qualified rights which a person has to hold personal property which is in his possession under certain circumstances in order to secure the performance of an obligation. Such liens are the liens of common carriers, of inn keepers and of unpaid vendors previously considered.

# **OUESTIONS**

- I. Define the following terms: property, estates, title, fixtures, freehold estate, land, tenement, hereditaments, landlord, tenant.
- II. Is an estate for life of greater or less legal interest than an estate for one hundred years?

  Is an estate for one hundred years considered real property or personalty?
- III. Wherein does an estate for years differ from an estate at will?
- IV. Allen rented a farm on January 2nd, 1912, for a period of four months. What sort of an estate was this?
  - V. Wherein does a conventional life estate differ from a legal life estate? Illustrate.
- VI. Who are lineal heirs? Who are collateral heirs?
- VII. For whose benefit is a homestead granted? Do you think that a homestead estate should be very highly regarded by the law, and is it so regarded?
- VIII. (a) What is an executory devise, and wherein does it differ from a reversion and a remainder?
  - (b) Allen owned a parcel of land in freehold. He made a will in which he devised the land to Baker for a period of ten years, and then di-

rected that the title should pass to Carter. What estate did Baker get? What estate did Carter get?

IX. What is the distinguishing characteristic of a joint-

tenancy?

(a) What rights has a landlord if a tenant fails to comply with the terms of the letting?

(b) What rights has a tenant if a landlord fails

to comply?

(c) What are the respective duties of a landlord and a tenant?

XI. What is a lease? How is it entered into? How is it terminated?

XII. What is a chattel personal? How are chattels personal held?

XIII. How is title to real estate acquired? How is title

to personalty acquired?

- XIV. Allen died leaving no heirs. At the time of his death Allen was the owner of a parcel of ground. To whom would this property go? What is the term used to designate this sort of a title?
- XV. The Allen Railroad Company needed a strip of ground on which to construct a station. The particular strip that the company wished belonged to Baker, a farmer, who did not wish to sell it. Is there any way the Allen Company could get this ground? What is the term, if any, used to designate title acquired in this way?

XVI. Give the requisites of a valid deed to real estate and state the component parts thereof.

XVII. Suppose a deed is not signed or delivered. Does that make any difference?

XVIII. What is a will? What is the term used to designate the title acquired to real estate through the instrumentality of a will? Suppose a per-

son dies leaving no will, and his heirs inherit his real estate. Is this title called "title by devise"? If not, what is it called?

XIX. In acquiring personalty what is meant by the title, "by act of the parties"?

XX. Wherein does a mortgage differ from a lien?
What sort of liens are there? Do you regard liens of great value?

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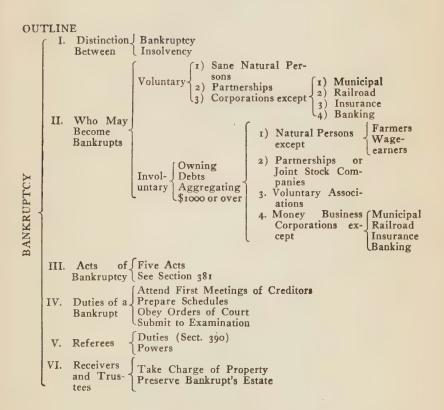
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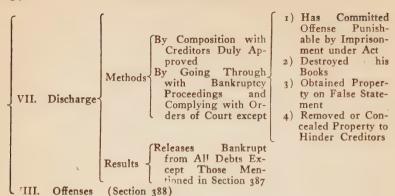
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# CHAPTER XXIV BANKRUPTCY





- 408. Historical consideration
- 409. Distinction between insolvency and bankrupt laws
- 410. The English and United States Bankrupt Acts
- 411. Terms defined and explained
- 412. Who may become bankrupts
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- 417. Composition with creditors
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- 423. Voluntary petition in bankruptcy
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  - A. Application for discharge
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Foreword.— In Article I, Section 8, of the Constitution

of the United States, among other things it is provided that the Congress of the United States shall have power to establish "uniform laws on the subject of bankruptcy throughout the United States" and "to promote the progress of science and useful arts, by securing for limited times to authors and inventors exclusive right to their respective writings and discoveries." Under authority of this provision of the Constitution, Congress has passed uniform laws on the subjects of Bankruptcy and Patents and Copyrights and it is these laws that we are to consider briefly in Chapters XXIV and XXV of this book.

§ 408. Historical Consideration.— There is some authority for the statement that in the early Roman days if a debtor (one who owes an obligation) could not meet his lawful obligations, his creditor (one to whom the obligation is due) could put him to death. Although the historical accuracy of this statement is questioned, yet there is no question that the creditor could sell his debtor into slavery at that time if such debtor did not meet his lawful obligations.

The early English common law did not permit the debtor to sell his creditor into slavery but it did fully sanction that the debtor, however innocent of wrong doing, might be imprisoned for failure to meet his obligations. As the standards of humanity and civilization became higher the English law-givers came to see that it was brutal to subject unfortunate debtors to shameful indignities and to criminal associations. Hence statutes were passed forbidding imprisonment for debt.

In the United States although imprisonment for a debt was at one time the vogue, statutes have now been passed in every State forbidding such imprisonment.<sup>1</sup>

§ 409. Distinction Between Insolvency and Bankrupt Laws.— "The difference between insolvency laws and bankrupt laws is this: The insolvency laws abolish imprisonment for debt, but do not discharge the debt; but the bankruptcy

<sup>(</sup>r) In a few states imprisoning a man for a debt is permitted provided it has grown out of a few specific wrongful acts enumerated in the statutes, such as wilful injuries to personal property, seduction, etc.

laws wipe out the debt itself; allowing the debtor to start afresh in the world. Bankruptcy proceedings can be instituted by the debtor or creditors; insolvency proceedings generally at the instance of the debtor. The United States bankruptcy law supersedes the State insolvency laws. They still remain in force in so far that imprisonment for a debt has been abolished; they are only suspended, however, not repealed. If the United States bankruptcy laws were to be repealed, the State insolvency laws would come into force immediately." <sup>a</sup>

§ 410. The English and United States Bankruptcy Acts.— By the early English bankruptcy acts it was enacted that when persons engaged in a trade met with business reverses and were unable to pay their debts they could secure a full discharge of all their obligations provided that they turned over all their property to their creditors and provided further that they were free from any dishonest or fraudulent conduct. These statutes, it will be noticed, applied only to those persons engaged in trade. Later on, however, the provisions were extended to include any and all persons. As a result of these statutes the man who had availed himself of their provisions could embark in a new business enterprise free from all his former debts.

In the United States, Congress has from time to time enacted and repealed the national bankruptcy acts. Thus, in 1801 the bankruptcy act was passed which was repealed in 1803; in 1841 another one was passed which was repealed in 1843; in 1867 a third bankruptcy act was passed and this was not repealed until 1878. The bankruptcy act which is now in force was enacted in 1898 and was amended in 1903, 1908 and 1910.

§ 411. Terms Defined and Explained.—Bankruptcy

<sup>(2)</sup> An insolvent has been said to be one who cannot pay his debts as they arise. But in the United States Bankrupt Act an insolvent is defined as a person, the aggregate of whose property exclusive of property concealed or fraudulently transferred, is not sufficient to pay his debts. In this discussion the term will be used in the latter significance.

<sup>(</sup>a) I. C. S. Reference Library: Law of Debtor and Creditor, Part 4,

may be defined as a system of substantive law fixing the rights between insolvent <sup>2</sup> debtors and their creditors. The fundamental idea is that when a person becomes insolvent his control over his property should cease, his property should be ratably divided among his creditors, and he should be enabled to start in business again free from the burden of his former debts.

In this discussion we shall use the term "bankrupt" to mean a person who has been adjudged by a court or a referee having jurisdiction, to be a bankrupt. The courts of bankruptcy are the United States District Courts, the United States Courts in the Territories, the Supreme Court of the District of Columbia, and the United States Court of the Indian Territory and of Alaska.

§ 412. Who May Become Bankrupts.— We will now enumerate those persons or beings that may become bankrupts:

I. Any person (including a partnership) except a municipal, railroad, insurance, or banking corporation is entitled to the benefits of the Bankrupt Act as a voluntary bankrupt.

Inasmuch as such persons file petitions of their own accord they are known as voluntary bankrupts. Insane persons can not become voluntary bankrupts, nor can infants except where they owe debts which by the law of the State they can not repudiate on reaching their majority. An alien is entitled to become a voluntary bankrupt. A person need not be insolvent to become a voluntary bankrupt but he must owe one or more debts.

### EXAMPLE:

Allen owed \$2,000 to a dozen creditors. Although Allen had a piece of land worth about \$2,500 he could not find a customer for it. His creditors pressed him so he finally determined to file a voluntary petition in bankruptcy. This he could do for the Act states that any natural person is entitled to the benefits of the Act. It makes no difference that Allen was not insolvent.

II. 1. (A) Any natural person except one engaged chiefly in farming or tilling the soil and

except a wage earner, that is, a person working for wages, salary or hire of \$1,-500 per annum or less;

(B) Any partnership or joint-stock company;

(C) Any unincorporated company (that is, voluntary association of individuals), and

(D) Any moneyed, business or commercial corporation except a municipal, railroad, insurance, or banking corporation;

2. Owing debts to the amount of \$1,000 or over.

3. May be adjudged an involuntary bankrupt upon default or impartial trial, and shall be subject to the provisions and entitled to the benefits of the act.

#### **EXAMPLES:**

1. Allen owed debts amounting to \$3,000. He was working as a foreman for a railroad company who paid him \$1,000 per year. Allen's creditors wished to file a petition in involuntary bankruptcy against Allen. They could not do so inasmuch as he was a wage earner and a wage earner cannot be forced into voluntary bankruptcy.

2. The Allen Company was a corporation engaged in the printing business. It owed \$800 worth of debts and it found itself unable to meet these obligations. The creditors of the company wished to file a petition of involuntary bankruptcy. The creditors could not force the company into involuntary bankruptcy, inasmuch as the company did not owe debts to the amount of \$1,000.

The Bankrupt Act expressly provides that municipal, railroad, insurance, or banking corporations can not be adjudged either voluntary or involuntary bankrupts.

In order to file a petition in involuntary bankruptcy against a debtor it is ordinarily necessary that three or more creditors who have provable claims against the debtor which amount in the aggregate to \$500 or over, should join in the petition. But if all the creditors of such debtor are less than twelve in number one of such creditors whose claim equals \$500 or more may file a petition to have the debtor adjudged a bankrupt. It must not be forgotten, however, that the debtor must owe at least \$1,000 in order to be adjudged an involuntary bankrupt.

Before it is possible that one be adjudged an involuntary bankrupt he must have committed some act of bankruptcy. The United States bankrupt act provides what are acts of bankruptcy. These will be enumerated in the following

paragraph:

§ 413. Acts of Bankruptcy.—The acts of bankruptcy which may be committed by a person 3 consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part or all of his property with intent to hinder, delay, or defraud his creditors or any of them, or (2) transferred while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference over other creditors by legal proceedings and not having at least five days before a sale or final disposition of any property effected by such preference vacated or discharged such preference or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of his insolvency a receiver or trustee has been put in charge of his property \* \* \* or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that account.

In regard to the first class it must be said that a person need not have been insolvent at the time of doing the act so long as he is insolvent at the time his creditors file the petition to have him adjudged an involuntary bankrupt. And again if the debtor is actually solvent at the time the petition is filed then he will not be adjudicated an involun-

tary bankrupt.

Classes two and three are meant to cover those cases in which a debtor attempts to prefer some of his creditors, that is, to pay some of his creditors to the exclusion of others. If the creditors proceed under this section they

<sup>(3)</sup> The word "person" is here used to mean either a natural person, or partnership, or unincorporated company, or a corporation and its officer, except municipal, railroad, insurance, and banking corporation.

must prove the debtor was insolvent at the time of the transfer.

In class four the man who has made the assignment for the benefit of his creditors under some State law, may thereupon be thrown into involuntary bankruptcy. It need not be shown that a debtor is insolvent under this portion of this clause. It is sufficient that he assign his property for the benefit of his creditors. But in this class it is also made an act of bankruptcy if the debtor who is insolvent applies for a receiver or trustee for his property or if a receiver or trustee is appointed either with or against his will. Under this portion of this clause it must be shown that the debtor was insolvent at the time of the filing of the petition in bankruptcy.

The fifth class covers those cases in which a person admits in writing his inability to pay his debts and his willingness to be adjudged a bankrupt. This is practically a case of voluntary bankruptcy. It is used when a person wishes to be adjudged a bankrupt, but when he can not or does not wish to pay the preliminary costs personally, as he must if he files a voluntary petition. When a person makes an admission in writing that he is unable to pay his debts and that he is willing to be adjudged a bankrupt, it makes no difference if he be solvent or insolvent, he may be adjudged a bankrupt.

A petition may be filed against a person who has committed an act of bankruptcy within four months after commission of such act. The person against whom an involuntary petition has been filed is entitled to have a trial by jury in respect to the question of insolvency and also in regard to the charge that he has committed an act of bankruptcy, but to entitle him to this, he must file a written application therefor at or before the time within which the answer in bankruptcy may be filed.

### **EXAMPLES:**

1. Allen, a manufacturer, owed \$5,000 and his total assets were \$8,000. He had 50 creditors. In order to hinder, delay, and de-

fraud his creditors, Allen transferred to his brother-in-law, Baker, without any consideration, \$5,000 worth of his property. The creditors of Allen, hearing of this, demanded immediate payment of their claims and upon Allen's refusal three of them holding claims aggregating \$1,000 filed a petit on in involuntary bankruptcy against Allen. This they could do successfully.

2. Allen, a farmer, owed debts to the amount of \$1,000 and his total assets amounted to but \$500. Allen committed an act of bankruptcy. His creditors filed an involuntary petition in bankruptcy against Allen. Such a petition would have to be dismissed inasmuch as Allen was one engaged chiefly in tillage of the soil and the act specifically provides that such persons can not be thrown into involuntary bankruptcy.

§ 414. Duties of a Bankrupt.— The duties of a bankrupt are stated in Chapter 3, Section 7, of the Act. Some of the particular duties are that the bankrupt shall attend the first meeting of his creditors, if directed by the court to do so, comply with all the lawful orders of the court, prepare schedules of his property, deliver such papers as shall be ordered by the court, submit to examination regarding his business and the cause of his bankruptcy and of his dealings with his creditors and others in business matters.

§ 415. Receivers.— Inasmuch as it is from 10 to 30 days after a petition is filed before trustees are appointed and inasmuch as it is not until about 10 days after their appointment that they qualify, it is often absolutely necessary for the preservation of the bankrupt's estate to appoint some one to take charge of the property of the bankrupt's estate until the trustees have been appointed and have qualified. Such persons, called receivers, are appointed by the judge of the court at the request of the parties in interest.

§ 416. Trustee.— From 10 to 30 days after the petition in (voluntary or involuntary) bankruptcy is filed and upon notice duly given, the creditors of the bankrupt hold a meeting at which time they elect a trustee who is to take charge of the bankrupt's property, convert all property into money, put out the money as directed by the referee, and close up the estate as expeditiously as compatible with the best in-

terest of all parties concerned. The trustee receives compensation for his services as fixed by the Bankrupt Act.

§ 417. Composition With Creditors.— If a petition in (voluntary or involuntary) bankruptcy is filed after the bankrupt has filed in court a schedule of all his property and the list of all his creditors, and after he has been examined in open court or had a meeting of his creditors he may then offer terms of composition to his creditors, that is, he may offer to pay his creditors a certain sum of money provided they will permit him to retain his property and provided further they will release him from all liability. If the majority in number and amount of the bankrupt's creditors agree to accept the composition thus offered and if the bankrupt deposits the money necessary to pay all debts which have priority and the costs of the proceedings, then the bankrupt may file an application with the court for a confirmation of the composition. The Act provides that the judge shall confirm the composition if satisfied (1) that it is for the best interest of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge which will be stated later); b (3) the offer and its acceptance are in good faith and have not been made or procured except as provided in the act, or by any means, promises, or acts forbidden by the Bankrupt Act.º

Upon confirmation of the composition, the amount agreed upon between the bankrupt and his creditors is distributed as the judge shall direct, and all the other property of the bankrupt is returned to him, and the case is dismissed. The bankrupt is thereby discharged from all his duties except from a few classes of debts specified in the act and set forth in § 419 hereof. If the composition cannot be reached between the bankrupt and his creditors or if the confirmation is not confirmed by the court the estate is then administered in bankruptcy just as if the bankrupt had not offered terms of composition.

<sup>(</sup>b) See § 378 of this chapter.

<sup>(</sup>c) Cf. Article 3, § 12.

#### EXAMPLE:

Allen, an honest but unfortunate business man, owed \$4,000 and he had but \$2,000 assets. Allen had 20 creditors. He filed a petition in voluntary bankruptcy. After he had filed a schedule of his property and after the first meeting of his creditors, Allen offered to pay his creditors 50c on the dollar. After due consideration 15 of Allen's creditors, whose claims aggregated \$3,000, agreed to accept the terms of Allen's offer, whereupon Allen filed with the court an application for confirmation of the composition. The court would in all probability confirm the composition inasmuch as it would be for the best interest of the creditors to avoid the expenses and delay incidental to administering the estate in bankruptcy, and Allen had been guilty of no misconduct and the settlement offered was in good faith. Cf. In re Kahn, 121 Fed. 418.

§ 418. Discharge.— Any person may, after the expiration of one month, and within the next twelve months subsequent to being adjudged a bankrupt, file a petition for discharge in the court of bankruptcy in which the proceedings are pending. If the court can be convinced that the bankrupt was unavoidably prevented from filing his application for discharge within the twelve months mentioned, the court has it in his power to permit the bankrupt to file his applica-

tion within the following six months.

The court hears and investigates the application for discharge, and also such proofs and pleas as may be made in opposition to such discharge of any parties in interest at a time as will give all parties in interest a reasonable opportunity to be fully heard. The court will grant a discharge unless it appear (1) that the bankrupt has committed some offense punishable by imprisonment as provided in the act; or (2) that the bankrupt, with intent to conceal his financial condition has destroyed, concealed, or failed to keep books of accounts or records from which such condition may be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors.

§ 419. Debts Not Affected by a Discharge.— A discharge in bankruptcy releases a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or muni-cipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

§ 420. Offenses.— The offenses in violation of the act

are as follows:

A. A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

B. A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) conscelled.

period not to exceed two years, upon conviction of the of-fense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any pro-ceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received

any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act; or (5) extorted or attempted to extort any money or property from any person as a consideraion for acting, or forbear-

ing to act in bankruptcy proceedings.

§ 421. Referees.— The United States Bankrupt Act creates the office of referee. Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

A referee has no jurisdiction to act unless the cases are referred to him by the court or in certain instances by the clerk of the court. The judge must act on such cases himself. But if there is no contest by the bankrupt or if the person files a voluntary petition in bankruptcy and if, moreover, the judge of the courts is absent from the division of the district in which the petition is filed, then the petition must be referred to the referee by the clerk of the court.

§ 422. Duties of Referees.— Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judge; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse,

or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate

in bankruptcy.

The bankruptcy act provides what the compensation of referees shall be.

# BANKRUPTCY FORMS

§ 423. Voluntary Petition in Bankruptcy.

To the Hon. Robert Adams, Judge of the District Court of the United States for the Eastern Judicial District of Missouri.

THE PETITION OF John Allen of the City of St. Louis, and State of Missouri, in the Eastern Division of said Judicial District of Missouri.

RESPECTFULLY REPRESENTS, that he has had his principal place of business for the greater portion of six months next immediately preceding the filing of this petition at 710 Locust Street in the City of St. Louis, Missouri, within said Division of said Judicial District; that he owes debts which he is unable to pay in full; that he is willing to surrender all

his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the act entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved July 1, 1898.

That the schedule hereto annexed, marked "A," and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said act.

That the schedule hereto annexed, marked "B," and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning his property as are required by the

provisions of said act.

Wherefore Your Petitioner Prays, that he may be adjudged by the court to be a bankrupt, within the purview of said act; and that he may be decreed to have a DISCHARGE FROM ALL HIS DEBTS provable under the same.

JOHN ALLEN, Petitioner.

RICHARD BAKER,

Attorney for Petitioner.

UNITED STATES OF AMERICA,
Eastern Division of the

Eastern Judicial District of Missouri.

I, John Allen, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

JOHN ALLEN, Petitioner.

Subscribed and sworn to before me, this 1st day of June, A. D. 1914. My commission expires October 15, 1915.

THOMAS CARTER,

Notary Public.

§ 424. Involuntary Petition in Bankruptcy.

To the Honorable Robert Adams, Judge of the District Court of the United States for the Eastern Judicial District of Missouri.

The petition of John Allen of the City of St. Louis, Missouri, and of Richard Baker of said City of St. Louis, Missouri, and of Thomas Carter of the City of Carthage, Mis-

souri, respectfully, shows:

First.— That Richard Donald has for the greater portion of the six months next preceding the date of the filing of this petition resided (or had his principal place of business) (or had his domicile) in the City of St. Louis, State of Missouri, and district as aforesaid, and that said Richard Donald owes debts to the amount of One Thousand (\$1,000) Dollars and upwards, and is insolvent, and is neither a wage earner, nor a person engaged principally in farming or the tillage of the soil, but is by occupation a merchant.

Second.— That your petitioners are creditors of the said Richard Donald, having provable claims against him amounting to the sum of Five Thousand Dollars in excess of securities held by them; that none of your petitioners is entitled to priority of payment of his said claim within the meaning of Section 64 (b) of the United States Bankruptcy Act, and Amendments thereof, nor has any of your petitioners received a preference within the meaning of Section 60 (a), (b) of such laws amended.

Third.— That the nature and amount of your petitioners'

claims are as follows:

The claim of petitioner, John Allen, is for One Thousand (\$1,000) Dollars for goods, wares and merchandise sold and delivered to said Richard Donald at his special instance and request on the 1st day of September, A. D. 1913, no part of which has been paid, though duly demanded.

(Here set forth the claims and demands of Baker and

Carter as set out in the case of Allen.)

And your said petitioners represent that the said Richard Donald while insolvent and within four months next preceding the date of this petition, to-wit, on the 1st day of May, A. D. 1914, committed an act of bankruptcy in that he did heretofore do the following acts and things.

(Here set forth specifically the acts of bankruptcy.)

Wherefore your petitioners pray that service of this petition with a subpoena be made upon the said Richard Donald as provided in the Acts of Congress relating to bankruptcy, and that he may be adjudged a bankrupt.

June 1st, A. D., 1914.

JOHN ALLEN, RICHARD BAKER, THOMAS CARTER,

EVERETT AND EVERETT,

Attorneys for Petitioners.

Office and postoffice address.

State of Missouri, City of St. Louis

John Allen, Richard Baker and Thomas Carter, petitioning creditors mentioned and described in the foregoing petition, do hereby severally make solemn oath that the statement of facts contained in the foregoing petition are true according to the best of their knowledge, information and belief.

JOHN ALLEN, RICHARD BAKER, THOMAS CARTER.

Subscribed and sworn to before me this 1st day of June, A. D. 1914. My commission expires October 15th, 1915.

THOMAS JONES.

Notary Public in and for County and State Aforesaid.

§ 425. Offer of Composition.

In the United States District Court for the Eastern Judicial District of Missouri

In the Matter of

RICHARD DONALD, Bankrupt.

No. 1000

To W. D. Coles, Esq., Referee in Bankruptcy, and the Creditors of Richard Donald, a Bankrupt.

The undersigned, Richard Donald, who was adjudicated a bankrupt herein on the 1st day of June, A. D. 1914, and whose schedules of creditors and property have been previously duly filed in the office of the clerk of the United States District Court of the Eastern Judicial District of Missouri, and who was duly examined in open court herein on the 15th day of June, A. D. 1914, does hereby offer a composition at fifty (50) per cent of the claims of his creditors allowed or to be allowed, except those entitled to priority in this proceeding and payable as follows: d

(Here state particulars of offer.)

RICHARD DONALD, Bankrupt.

June 16th, 1914. (This should be verified by affidavit.)

§ 426. Proof of Claims.

A. Proof of Unsecured Claim by a Corporation
In the District Court of the United States for the
Eastern Division of the Eastern Judicial
District of Missouri

In the Matter of John Allen,

IN BANKRUPTCY.

Bankrupt.

At the City of St. Louis, in said district of Missouri, on the first day of June, A. D. 1914, came Robert Baker, of St. Louis, and State of Missouri, and made oath, and says he is Treasurer, of the Baker Company, a corporation incorporated by and under the laws of the State of Missouri, and carrying on business at 408 Locust Street, in the City of St. Louis, and State of Missouri, and that he is duly authorized to make this proof, and says that the said John Allen, the person by whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of the said petition, and still is justly and truly indebted to said corporation, in the sum of Two Thousand Dollars for goods, wares and merchandise sold and delivered said John Allen

<sup>(</sup>d) See Hager and Alexander, bankruptcy forms, p. 386.

on February first, 1914, by said Baker Company at the special instance and request of said John Allen, as follows:

4,000 Telephone Receivers, Grade No. 3 at 50c per receiver — \$2,000.00; that no part of said debt has been paid; that there are no set-offs or counterclaims to the same; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever; and that no note has been received for said debt and no judgment recovered thereon except as herein mentioned.

BAKER COMPANY,
By Robert Baker,
Treasurer of Said Corporation.

Subscribed and sworn to before me this first day of June,
A. D. 1914. My commission expires October 15th, 1915.
(SEAL) THOMAS CARTER,
Notary Public.

 B. Proof of Unsecured Claim by a Partnership
 In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri

In the Matter of JOHN ALLEN,

IN BANKRUPTCY.

Bankrupt.

At St. Louis, in said district of Missouri, on the first day of June, A. D., 1914, came Richard Baker, of St. Louis, in the City of St. Louis, in said district of Missouri, and made oath and says that he is one of the firm of Baker and Carter consisting of himself and Thomas Carter, said firm being, of Clayton, in the County of St. Louis, and State of Missouri, that the said John Allen, the person by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of One Thousand Dollars that the consideration of said debt is as follows:

Goods, wares, and merchandise sold and delivered said John Allen on February first, 1914, by said Baker & Carter at the special instance and request of said John Allen, as follows:

4,000 No. 5 Letter Trays at 25c per tray — \$1,000; that no part of said debt has been paid; that there are no setoffs or counterclaims to the same; and this deponent has not, nor has his said firm, nor has any person by their order or to this deponent's knowledge or belief, for their use, had or received any manner of security for said debt whatever, and that no note has been received for said debt, and no judgment recovered thereon except as herein mentioned.

BAKER & CARTER,

By Richard Baker, Creditor.

Subscribed and sworn to before me this first day of June,
A. D., 1914. My commission expires October 15th, 1915.

(SEAL) THOMAS CARTER,

Notary Public.

§ 427. Discharge:

A. Application for a Discharge

United States of America,

Eastern Division of the Eastern Judicial ss.

District of Missouri.

In the District Court of the United States. In and for Said Division of Said District.

IN BANKRUPTCY.

Bankrupt.

To the Honorable Robert Adams, Judge of the District Courts of the United States for the Eastern District of Missouri.

John Allen, of St. Louis, in the City of St. Louis and State of Missouri, in said Division of said District, respectfully represents that on the 1st day of June, 1913, last past, he was duly adjudged a bankrupt under the acts of Congress relating to Bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with

all the requirements of said acts and of the orders of the

court touching his bankruptcy.

WHEREFORE HE PRAYS that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

JOHN ALLEN, Bankrupt.

United States of America,
Eastern Division of the Eastern Judicial
Ss.
District of Missouri.

I, John Allen, the petitioner above named, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by me are true according to the best of my knowledge, information and belief.

JOHN ALLEN, Petitioner.

Subscribed and sworn to before me, this 1st day of Sept., A. D. 1914.

THOMAS BAKER, Notary Public.

#### Order of Notice Thereon

United States of America,
Eastern Division of the Eastern Judicial
Ss.
District of Missouri.

On this 1st day of Sept., A. D. 1914, on reading the foregoing petition and also the report thereon of the Referee

in charge of said cause,

IT IS ORDERED BY THE COURT, that a hearing be had upon the same on the 1st day of December, A. D. 1914, before said Court, at St. Louis, in said Division of said District, at ten o'clock in the forenoon; and that notice thereof be published in St. Louis *Examiner*, a newspaper printed in said District, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

AND IT IS FURTHER ORDERED BY THE COURT that the Clerk shall send by mail to all known creditors certified copies of said petition and this order, addressed to them at their places of residence as stated.

WITNESS the Honorable Robert Adams, Judge of said Court, and the seal thereof, at St. Louis, in said division of

said District, this 1st day of Sept., A. D. 1914.

RICHARD BAKER,

Clerk.

#### B. Order of Discharge.

District Court of the United States,
Eastern Division of the Eastern Judicial ss.
District of Missouri.

Whereas, John Allen, of St. Louis, in said Division of said District, has been duly adjudged a bankrupt, under the Acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered, by the Court that said John Allen be discharged from all debts and claims which are made provable by said acts against his estate and which existed on the 1st day of June, A. D. nineteen hundred and fourteen, on which day the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

WITNESS the Honorable Robert Adams, Judge of said District Court and the seal thereof, this 1st day of Decem-

ber, A. D. nineteen hundred and fourteen.

RICHARD BAKER,

Clerk.

#### **QUESTIONS**

I. What is the vital distinction between the Federal Bankrupt Act and the State insolvency laws? Which do you think better, and why?

II. Define the term "Bankruptcy." What are the courts of bankruptcy in the United States?

III. Can a railroad corporation become a bankrupt? If so, do you think this is right? If not, what can

creditors do if a railroad company is unable to

pay its debts?

IV. Allen owed debts in the sum of \$950. Four of his creditors, holding claims in the sum of \$700, filed an involuntary petition in bankruptcy against Allen, alleging three acts of bankruptcy which they were able to prove. Can they have Allen adjudged a bankrupt? Why?

V. Give an original illustration of each of the acts of

bankruptcy.

VI. When should a receiver in bankruptcy be appointed?

VII. What is a composition with creditors? When can a bankrupt make a composition?

VIII. What is a discharge in bankruptcy?

IX. What are the offenses against the bankrupt act?

X. What are the duties and powers of referees?

### REFERENCES

F. O. Loveland on Law and Proceedings in Bankruptcy

(The W. H. Anderson Co., Cincinnati)

F. B. Gilbert's Collier on Law and Practice in Bankruptcy

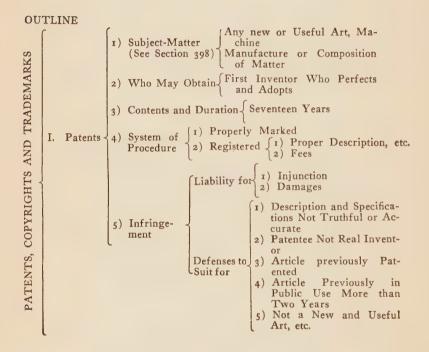
(Matthew Bender & Co., Albany, N. Y.)

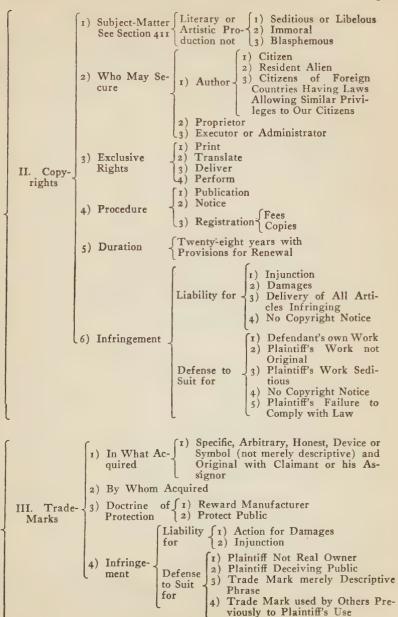
H. Remington on Bankruptcy Law of the United States

(The Michie Co., Charlottesville, Va.)

#### CHAPTER XXV

## PATENTS, COPYRIGHTS, AND TRADE-MARKS





§ 428. Introduction

§ 429. Definition and explanation

§ 430. Subject-matter of patents

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#### Copyrights

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§ 461. Remedy for infringement

§ 462. The United States Statutes

§ 428. Introduction.— The subjects of patents, copyrights, and trade-marks are so extremely technical, that the practice of this branch of the law is almost exclusively in the hands of attorneys who specialize therein. This chapter will be devoted largely to a mere statement of the principal features of the Federal statutes relating to these subjects.

§ 429. Definition and Explanation.— The word "patent" was used in a previous chapter to denote an instrument by which the State or government grants public lands to an individual. This use of the term, however, is not the one in which the term is generally employed. As ordinarily stated, a patent is a grant by the government to the inventor of a new and useful invention of the exclusive right to make, use, sell and to authorize others to make, use and sell the subject-matter of the invention. It is in this sense the term will be used in this chapter.

As has been indicated previously the Congress of the United States bases its authority to legislate in regard to patents and copyrights upon the provision of the Constitution of the United States in which Congress is empowered "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." a From this it will be seen that the reason for granting patents is to stimulate inventors to activity. After a definite period of years inventions become the common property of the nation.

§ 430. Subject-Matter of Patents.— Section 4886 of the Revised Statutes of the United States reads as follows:

<sup>(1)</sup> The words "invention" and "discovery" are used in reference to patents to indicate the act or operation of finding out something new and useful; the process of contriving and producing something not previously known or existing, by exercise of independent investigation and experiment; also the article or contrivance or composition so invented. It is not sufficient that a thing shall be new; it must also be useful and by useful is meant that it will be of benefit to mankind in a greater or less degree. A machine to poison people would not be an invention as the term is used in the United States statutes. Cf. Black's Law Dictionary: Invention.

<sup>(</sup>a) Constitution of the United States, Article I, § 8.

Any person who has invented or discovered any new and useful (1) art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, (2) not known or used by others in this country, before his invention or discovery thereof, and (3) not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than two years prior to his application, and (4) not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor.

This statement requires explanation. What the words "invention" and "discovery" mean under the act and the use of the term "useful" in connection therewith have already been discussed. The term "art" means the process or manner of treating common articles to get certain results. It is used to cover those cases in which the application of method is the most important part of the invention, while the means by which the principle is applied is of secondary consequence. A machine is "any contrivance used to regulate or augment force of motion; more properly, a complex structure, consisting of a combination, or peculiar modification, of the mechanical powers." The term "manufacture" is used in patent law as a noun. It means any new and useful product made directly by human labor, or by the aid of machinery directed and controlled by human power, either from raw materials or from materials worked up in a new form. "Composition of matter" means a mixture or commercial composition of materials. An "improvement" is any addition to, or modification of a previous invention or discovery, intended to increase its utility, or change its mode of operation.b

<sup>(</sup>b) Cf. Black's Law Dictionary: Machine, manufacture, composition of matter, improvement.

#### **EXAMPLES:**

- r. Allen found after long years of experiment that the vibrations of air could be so controlled that messages could be sent from a long distance. After working out this principle, he invented a device by which messages could be sent and messages could be received. The principle of controlling the vibrations may very properly be called an art. The devices by which the vibrations were sent and received may be termed machines.
- 2. Allen invented a new sort of handle for shovels. This would be called a manufacture.
- 3. Allen found that by mixing certain chemicals in a certain way he could get a beverage which tasted like beer but which contained no alcohol. The process or principle underlying Allen's invention may very properly be termed an art. The final result, that is the beverage itself, is a composition of matter.
- 4. Allen invented a little hook which can be added to sewing machines and which will greatly increase their efficacy. This hook may very properly be termed a manufacture or improvement to a machine.
- (1) If an invention or discovery was publicly known and used by others in the United States at any time before the person applying made his invention or discovery, then notwithstanding that he arrived at his invention independently and that he knew nothing of the use of the article previously, still the article cannot be validly patented by him. It may also be said that the discovery or working out of the invention will not prevent any other independent discoverer from obtaining a valid patent, provided the article has neither been previously patented nor previously described in any printed publication and provided the earlier inventor kept the secret to himself, inasmuch as the invention or discovery was not generally known or used in the sense of the law.

(2) If an invention has been patented in the United States or in any foreign country whatever, a later inventor cannot obtain a valid patent afterwards in the United States, notwithstanding that he arrived at his results independently, without knowledge of the patent by the other party. If the invention has been described in any publication in the United

States or in any foreign country, then the one who invents such article after such description cannot obtain a valid patent therefor, notwithstanding that he did not know any-

thing of the prior description in the publication.

If a person invents something he ought to apply for a patent therefor as soon as possible. But no person otherwise entitled thereto will be barred from receiving a patent for his invention or discovery, nor will any patent be declared invalid by reason of its having been first obtained or caused to be obtained by the inventor (himself) or his legal representatives, or his assigns in a foreign country, unless application for such foreign patent was filed more than twelve months prior to the filing of the application in this country, in which latter case no valid patent can be granted in this country.°

(3) If an article has been in public use or on sale in the United States for more than two years prior to the application for a patent then notwithstanding that the inventor made the invention long before the article came into public use, still he cannot obtain a valid patent therefor.

§ 431. Designs.— Section 4929 of the Revised Statutes of the United States provides that any person who has invented any new, original, and ornamental design for an article of manufacture, not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law and other due proceedings had, the same as in cases of inventions or discoveries covered by Section 4886, herein previously described, obtain a patent therefor.

A design may be said to be an instrument, created by the imposition on a physical substance of some peculiar shape

<sup>(</sup>c) R. S. U. S., § 4887.

or ornamentation which produces a particular impression upon the human eye, and through the eye upon the mind.<sup>d</sup> Every person has seen designs. Thus, for example, on the doors of most kitchen stoves there are representations of one kind or another worked right into the door. Such representations are designs. So also on iron stoves there are pictures worked out in some peculiar way. These too are designs.

Section 4933 of the Revised Statutes of the United States provides that all regulations and provisions which apply to the patenting and to protecting patents for inventions or discoveries, not inconsistent with certain other sections, also

apply to designs.

§ 432. Who May Obtain a Patent.— The first inventor who perfects, and adapts his invention to use and who uses reasonable diligence in applying for a patent, or in the event of his death his executor or administrator, is the only per-

son entitled to a patent therefor.

- § 433. Contents and Duration of Patents.— Every patent should contain a short title or description of the invention or discovery, correctly indicating its construction and mode of operation, and a grant to patentee, his heirs or assigns <sup>2</sup> for a term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States and the territories thereof, referring to the specifications attached for the particulars thereto, and a copy of the specifications and drawings of the patented article should be annexed to the patent and should be a part thereof.
- (2) Section 4898 of the Revised Statutes of the United States states in part that every patent or any interest therein is assignable in law by an instrument in writing, and the patentee or his assigns or legal representatives may in like manner grant and convey an exclusive right under his patent to the whole or any specified part of the United States. An assignment, grant, or conveyance is void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months from the date thereof.
  - (d) Cf. Bouvier's Law Dictionary: Design.
  - (e) R. S. U. S., § 4884.

The length of time in regard to designs, however, is not the same as for ordinary patents. Patents for designs may be granted for three and one-half years, for seven years, or for fourteen years, as the applicant may, in his application, elect.<sup>f</sup>

§ 434. System and Procedure.— The patent office of the United States is under the control of the Department of the Interior, but there is a specific head of the department, called the Commissioner of Patents and there are many other minor officials.<sup>g</sup>

All patents are issued in the name of the United States of America under the seal of the office, and are signed by the Commissioner of Patents and are recorded together with the specifications for the patent in the patent office.h sons desiring a patent must make a written application therefor to the patent office. They must file in the patent office a written description of the invention and of the manner and process of making, constructing, compounding, and using it in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is connected, to make, construct, or compound, and use the same without any further explanation. In case of a machine the applicant must explain the principle thereof, and the best mode in which he contemplates applying the principle, so as to distinguish it from other inventions; and he must particularly point out and distinctly claim the part, improvement, or combination which he offers as his invention or discovery. The specification and claim must be signed by the inventor.i

When the nature of the case admits of drawings, the applicant must furnish one copy signed by the inventor or his attorney in fact, which drawings are filed in the Patent Office; and a copy of the drawing, to be furnished by the Patent Office, should be attached to the patent as a part of the

<sup>(</sup>f) R. S. U. S., § 4931.

<sup>(</sup>g) R. S. U. S., § 4875.

<sup>(</sup>h) R. S. U. S., § 4883.

<sup>(</sup>i) Cf. R. S. U. S., § 4888.

specification.<sup>j</sup> When the invention or discovery is of a composition of matter, the applicant, if required by the Commissioner, must furnish specimens of ingredients and of the composition, sufficient in quantity for the purpose of experiment.<sup>k</sup> In all cases which admit of representation by model, the applicant, if required by the Commissioner must furnish a model of convenient size to exhibit advantageously the several parts of his invention or discovery.<sup>1</sup>

The applicant must make oath that he verily believes himself to be the original and first inventor or discoverer of the art, machine, manufacture, composition or improvement for which he solicits a patent; that he does not know and does not believe that the same was ever before known or used by others in this country before his invention or discovery thereof; that the same has not been patented or described in any printed publication in any country before his invention or discovery thereof or more than two years prior to the application; also that the invention has not been on sale for more than two years prior to the application; also that the same has not been patented by him in a foreign country more than twelve months prior to date of application in this country. He must state also of what country he is a citizen. Such oath may be made before any person within the United States authorized by law to administer oaths, or, when the applicant resides in a foreign country, before any minister, charge d'affaires, consul, or commercial agent holding commission under the Government of the United States, or before any notary public, judge, or magistrate having an official seal and authorized to administer oaths in the foreign country in which the applicant may be, whose authority shall be proved by certificate of a diplomatic or consular office of the United States."

On the filing of any such application and the payment of the fees required by law, the commissioner of Patents causes

<sup>(</sup>j) Cf. R. S. U. S., § 4889.

<sup>(</sup>k) Cf. R. S. U. S., § 4890.

<sup>(1)</sup> Cf. R. S. U. S., § 4891.

<sup>(</sup>m) R. S. U. S., § 4892.

an examination to be made of the alleged new invention or discovery; and if on such examination it appears that the claimant is justly entitled to a patent under the law, the Commissioner must issue a patent therefor."

§ 435. Fees.—The following are the fees or costs

charged by the Government in issuing a patent:

On filing each original application for a patent, except in

a design case, fifteen dollars.

On issuing each original patent, except design cases, twenty dollars.

In design cases:

For three and one-half years, ten dollars.

For seven years, fifteen dollars.

For fourteen years, thirty dollars.

§ 436. Duties of Patentees.— It is the duty of all patentees, and their assigns and legal representatives, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that the same is patented; either by fixing thereon the word "patented," together with the day and year the patent was granted; or when, from the character of the article, this can not be done, by fixing to it, or to the package wherein one or more of them is inclosed, a label containing a like notice; and in any suit for infringement, by the party failing so to mark, no damages can be recovered by the plaintiff, except on proof that the defendant was so notified of the infringement, and continued, after such notice, to make, use, or vend the article so patented.

§ 437. Infringement of Patents.— To infringe a patent means to encroach upon the rights of the person holding the patent. The criterion of infringement is substantial identity of the construction or operation. Mere changes in form, or appearance or substitution of mechanical equivalents, will still be infringements, unless they involve a substantial difference of construction, operation or effect.

<sup>(</sup>n) R. S. U. S., § 4893.

<sup>(</sup>o) R. S. U. S., § 4900.

<sup>(</sup>p) 3 McLean (U. S.) 250, 15 Howard (U. S.) 63.

§ 438. Liability for Infringement.— The court may issue an injunction restraining the party violating the patent from doing so in the future. Upon a decree being rendered the complainant is entitled in addition to an accounting of the profits made by the one infringing the patent also the damages sustained during six years prior to the filing of the complaint.<sup>a</sup> There are also certain penalties provided by the act for infringement of a patent.

# Penalties for Falsely Marking an Article Patented

Every person who, in any manner, marks upon anything made, used, or sold by him for which he has not obtained a patent, the name or any imitation of the name of any person who has obtained a patent therefor, without the consent of such patentee, or his assigns or legal representatives; or who in any manner, marks or affixes to any such patented article the word "patent" or the words "letters patent," or any word of like import, with intent to imitate or counterfeit the mark or device of the patentee, without having the license or consent of such patentee or his assigns or legal representatives; or who, in any manner, marks upon or affixes to any patented article the word "patent" or any word importing that the same is patented, for the purpose of deceiving the public, is liable, for every such offense, to a penalty of not less than one hundred dollars, with costs; one-half of said penalty to go to the person who shall sue for the same, and the other to the use of the United States, to be recovered by suit in any district court of the United States within whose jurisdiction such offense may have been committed."

§ 439. Defense of Suit for Infringement.—In any action for infringement the defendant may plead the general issue, that is, may deny generally all the allegations made by the complainant, and, having given notice in writing to the plaintiff or his attorney thirty days before, may prove on trial any one or more of the following special matters:

<sup>(</sup>q) R. S. U. S., § 4921.

<sup>(</sup>r) R. S. U. S., § 4901.

(1) That for the purpose of deceiving the public the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or,

(2) That the patentee had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and

perfecting the same; or,

(3) That the article had been patented or described in some printed publication prior to his supposed invention or discovery thereof, or more than two years prior to his application for a patent therefor; or,

(4) That the patentee was not the original and first inventor or discoverer of any material and substantial part

of the thing patented; or,

(5) That the article had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public; or,

(6) That the invention in discussion was not a new and useful art, machine, manufacture, or composition of matter.

# Copyright

§ 440. Introduction and Definition.— By the Common Law both in England and in the United States, that is, through the decisions of the Courts of Last Resort, it is now settled that the author of an unpublished <sup>1</sup> intellectual production has the exclusive ownership and right of the disposition of such production. This has been termed "Literary Property" or "Common-Law Copyright."

The owner of literary property is entitled to the same protection as the owner of any other personal property including the right to the use of the injunctive powers of Courts of Equity. But if a work is published the common law copyright is lost and any one then has the right to multi-

<sup>(1)</sup> Publication in the law of copyrights means making public a given literary production by offering it to the public by the sale or distribution of copies.

ply copies unless the author is protected in his rights under the statutes.

The statutes which grant to authors of literary or artistic productions the exclusive right to print, reprint and sell these productions are called copyright laws. Copyright in the United States may then be defined as the right granted by the United States Statutes to the author or originator of certain literary or artistic productions whereby such a person is invested for a limited period with the exclusive right to multiply and vend copies of such productions and to perform publicly or cause to be performed a such intellectual productions as by their nature admit of such treatment.

§ 441. Who May Secure a Copyright.— The persons entitled by the act to copyright protection for their works

are:

(1) The author of the work, if he is:

(a) A citizen of the United States, or

(b) A resident alien domiciled in the United States

at the time of the first publication of his work, or

- (c) A citizen or subject of any country which grants either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto. The existence of reciprocal copyright conditions is determined by presidential proclamation.<sup>2</sup>
- (2) Presidential copyright proclamations have been issued securing to the citizens or subjects of the following countries copyright privileges in the United States: Austria, Chile, China, Costa Rica, Cuba, Denmark, France, Germany, Great Britain and her possessions, Guatemala, Honduras, Italy, Mexico, Netherlands (Holland) and possessions, Nicaragua, Norway, Portugal, Salvador, Spain, Switzerland, Belgium, Japan and Luxemburg.

(a) Cf. 25 Cyc. § 1489 and citations.

(2) The proprietor of a work. The word "proprietor" is here used to indicate a person who derives his title to the work from the author. If the author of the work should be a person who could not himself claim the benefit of the copyright act, the proprietor can not claim it.

(3) The executors, administrators or assigns of the

above-mentioned author or proprietor.

§ 442. Essentials in Order to Obtain a Copyright.—The United States Copyright Acts say nothing in regard to the quality of the work which is essential before a valid copyright can be had therein. It is, therefore, necessary to examine the judicial records to obtain this information. Briefly stated it may be said that a work must possess originality in order that it may be copyrighted. Again a production must not be (1) seditious or libelous (2) immoral or (3) blasphemous if a valid copyright is to be had therein.

(I) Mr. Drone notes the following tests of originality: "In all cases, whatever may be the kind or character of the work for which protection is claimed, the true test of originality is whether the production is the result of independent labor, or of copying. A close resemblance between two publications may afford strong evidence of copying; and in some cases, especially when the similarity is not explained, it may amount to conclusive proof of piracy. But, when it is established that the work is the result of honest authorship, its likeness to another publication is immaterial."

(1) Seditious works (those works which tend to excite dissatisfaction, hatred, or contempt of the government) and libelous works (those works which are calculated to injure the reputation of a person by bringing him into public hatred, ridicule or contempt) are condemned by law and, therefore, for such works one cannot obtain a valid copyright.

(2) Immoral works are under the same ban as seditious works and therefore a valid copyright can not be obtained therein.

(3) For blasphemous publications as has already been

(b) Drone on Copyrights, p. 208.

said, one can not obtain a valid copyright. But it is a very difficult matter to determine what works shall be considered blasphemous, especially in the United States. "From the liberal character of the government of the United States, and the freedom of religious belief and worship accorded to all its citizens it may reasonably be inferred that large liberty of discussion and publication on moral and religious subjects would be permitted. And such is the fact, as appears from our comparatively meagre judicial records involving the subject. But in this country, nevertheless, there are limitations to liberty of speech and the press; and there is such a thing as blasphemy known to the law and punishable as a crime." "

§ 443. Subject-Matter of a Copyright.— The works for which a copyright may be secured include all literary and artistic productions of the author. Section 5 of the Copyright Act of 1909 makes what is thought to be a sweeping classification of literary and artistic works. The application for registration of a copyright must specify the class to which the work belongs for which copyright is sought. The following gives this classification together with a brief ex-

planation of the terms used:

(a) Books.— This term includes, all printed literary works (except dramatic compositions) whether published in the ordinary shape of a book or pamphlet, or printed as a leaflet, card, or single page. The term "book" as used in the law includes tabulated forms of information, frequently called charts; tables of figures showing the results of mathematical computations, such as logarithmic tables, interest, cost, and wage tables, etc., single poems, and the words of a song when printed and published without music; librettos; descriptions of moving pictures or spectacles; encyclopedias; catalogues; directories; gazetteers and similar compilations; circulars or folders containing information in the form of reading matter other than mere lists of articles, names and addresses; and literary contributions to periodicals or newspapers.

<sup>(</sup>c) Smith on Personal Property, § 49.

The term "book" can not be applied to the following:

- (1) Blank books for use in business or in carrying out any system of transacting affairs, such as record books, account books, memorandum books, diaries or journals, bank deposit and check books; forms of contracts or leases which do not contain original copyrightable matter; coupons; forms for use in commercial, legal, or financial transactions, which are wholly or partly blank and whose value lies in their usefulness and not in their merit as literary compositions.
- (2) Directions on scales, or dials, or mathematical or other instruments; puzzles; games; labels; wrappers; formulae on boxes, bottles, and other receptacles of articles for sale or meant to accompany such articles.

(3) Advertisements or catalogues which merely set forth the names, prices, and places where articles are for

sale.

- Prefaces or other introductory matter to works not themselves entitled to copyright protection, such as blank books.
- (5) Calendars are not capable of registration as such, but if they contain copyrightable reading matter or pictures they may be registered either as "books" or "prints" according to the nature of the copyrightable matter.

(b) Periodicals. This term includes newspapers, mag-

azines and reviews.

(c) Lectures, sermons, addresses, or similar productions, prepared for oral delivery.

(d) Dramatic or dramatico-musical compositions, such

as dramas, comedies, operas, operettas and similar works. The designation "dramatic composition" does not include the following: dances or ballets, stage settings or mechanical devices by which dramatic effects are produced, or "stage business"; animal shows, sleight-of-hand performances, acrobatic or circus tricks of any kind; descriptions of moving pictures or of settings for the production of moving pictures. (These, however, when printed and published, are registrable as "books.")

Dramatico-musical compositions include principally operas, operettas, and musical comedies, or similar productions which are to be acted as well as sung.

Ordinary songs, even when intended to be sung from the stage in a dramatic manner, or separately published songs from operas and operettas, should be registered as musical

compositions, not dramatico-musical compositions.

(e) Musical compositions, including vocal and all instrumental compositions, with or without words. But when the text is printed alone it should be registered as a "book," not as a musical composition. Adaptations and arrangements may be registered as "new works" under the provisions of Section 6.

(f) Maps.— This term includes all cartographical works, such as terrestrial maps, plats, marine charts, star maps, but not diagrams, astrological charts, landscapes, or drawings of imaginary regions which do not have a real existence.

(g) Works of Art.— This term includes all works belonging fairly to the so-called fine arts; i. e., paintings, drawings, and sculpture.

Productions of the industrial arts utilitarian in purpose and character are not subject to copyright registration, even

if artistically made or ornamented.

No copyright exists in toys, games, dolls, advertising novelties, instruments or tools of any kind, glassware, embroideries, garments, laces, woven fabrics, or any similar articles.

(h) Reproductions of Works of Art.— This term refers to such reproductions (engravings, woodcuts, etchings, casts, etc.), as contain in themselves an artistic element distinct from that of the original work of art which has been reproduced.

(i) Drawings of Plastic Works of a Scientific or Technical Character.— This term includes diagrams or models illustrating scientific or technical works, architects' plans, de-

signs for engineering work, etc.

(j) Photographs.— This term includes all positive prints from photographic negatives, including those from

moving picture films (the entire series being counted as a single photograph), but not photogravures, half-tones, and other photo-engravings.

(k) Prints and Pictorial Illustrations.— This term comprises all pictures not included in the various other

classes enumerated above.

Articles of utilitarian purpose do not become capable of copyright registration because they consist in part of pictures which in themselves are copyrightable; e. g., puzzles, games, badges, buttons, bucktes, pins, novelties of every description, or similar articles.

Postal cards can not be copyrighted as such. The pictures thereon may be registered as "prints or pictorial illustrations" or as "photographs." Text-matter on a postal card may be of a character that it may be registered

as a "book."

Mere ornamental scrolls, combinations of lines and colors, decorative borders, and similar designs, or ornamental letters or forms of type are not included in the designation "prints and pictorial illustrations." Trade-marks can not be copyrighted or registered in the Copyright Office.

(1) Motion Picture Photoplays.— This means a mo-

tion picture which has a plot and tells a story.

(m) Motion Pictures Other than Photoplays.— This includes motion pictures which do not tell a connected story.

It is provided in Section 15, of the Act that of the printed books or periodicals mentioned under (a) and (b) in this paragraph, except the original text of a book of foreign origin in a language or languages other than English, the text of all copies accorded protection under the Act, except as below provided, must be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein, or if the text be produced by lithographic process, or photoengraving process, then by a process wholly performed within the limits of the United States, and the printing of the text and binding of the book must be performed within

the limits of the United States. These requirements extend also to the illustrations within a book consisting of printed text and illustrations produced by lithographic process, or photo-engraving process, and also to separate lithographs or photo-engravings, except where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art; but they do not apply to works in raised characters for the use of the blind, or to books of foreign origin in a language or languages other than English or to books published abroad in the English language seeking ad interim protection under the Act.

§ 444. Exclusive Rights Secured Under Copyright Law.— Any person entitled thereto, upon complying with the provisions of the Act, has the exclusive right:

(a) To print, reprint, publish, copy, and vend the copy-

righted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a non-dramatic work; to convert it into a novel or other non-dramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon,

address, or similar production;

(d) To perform or represent the copyrighted work publicly if it be a drama, or if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever.<sup>d</sup>

<sup>(</sup>d) Bulletin 14, 1913, § 1, p. 7.

(e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit; and for the purposes set forth in sub-section (a) to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced. This section has certain provisos for the subject-matter of which the reader is referred to Section 1, page 7 of the Copyright Law of the United States, Bulletin No. 14.

§ 445. Assignment of Copyrights.— Copyright secured under this or previous Acts of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be be-

queathed by will.

Every assignment of copyright should be recorded in the copyright office within three calendar months after its execution in the United States or within six calendar months after its execution without the limits of the United States. In default of the foregoing the assignment is void as against any subsequent purchaser or mortgagee for valuable consideration, without notice, whose assignment has been duly recorded.<sup>6</sup>

§ 446. Procedure to Obtain a Copyright.— In order to obtain a well-founded copyright it is necessary that certain things be done. There are two classes of works, the

"published" and "unpublished."

§ 447. Published Works.— Any person entitled thereto may secure a copyright for his work by publication thereof with a notice of the copyright required by the act. Publication under the act means placing literary or artistic production on sale, selling it, or publicly distributing it. The notice of the copyright required by the act in general may be said to consist in the insertion of the word "Copyright" or the abbreviation "Copr.," accompanied by the name of the copyright proprietor, and if the work be a printed lit-

<sup>(</sup>e) Bulletin 14, §§ 42, 44, pp. 19-20.

erary, musical, or dramatic work, the notice should include also the year in which the copyright was secured by publication.

The notice of copyright is applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music; provided, that one notice of copyright in each volume or in each number of a newspaper or periodical published suffices.<sup>g</sup>

After publication of a work with the copyright notice inscribed, two complete copies of the best edition of the work must be sent to the Copyright Office, with a proper application for registration correctly filled out and a money order for the amount of the legal fee. Where, however, a work is not reproduced for sale one copy only of the work need

be deposited.i

The statute requires that the deposit of the copyright work shall be made "promptly" which has been defined as "without unnecessary delay." It is not essential, however, that the deposit be made on the very day of publication.

Should the copies called for not be promptly deposited as provided, the Register of Copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright is liable to a fine of one hundred dollars and to pay to the Library of Congress twice the amount of the retail price of

<sup>(</sup>f) Bulletin 14, 1913, § 18, p. 14.

<sup>(</sup>g) Bulletin 14, 1913, § 19, p. 14.

<sup>(</sup>h) Bulletin 14, 1913, § 12, p. 11.

<sup>(</sup>i) Bulletin 14, 1913, § 11, p. 11.

the best edition of the work, and the copyright becomes

## Registration

§ 448. Fees.— After the publication of any work entitled to copyright, the claimant should register his claim in the copyright office. For the registration of his claim the person pays a fee of one dollar for which sum he is entitled to a certificate of registration under seal. In the case of photographs where the certificate is not demanded only a fee of fifty cents need be paid for registration. Whenever possible the author should send at the same time his registration for copyright, registration fee, and the copies of the work.

The application for copyright registration required to be sent with each work must state the following facts, with-

out which no registration can be made:

(1) The name and address of the claimant of copyright;

(2) The nationality of the author of the work;

(3) The title of the work;

- (4) The name and address of person to whom certificate is to be sent;
  - (5) The particular class to which the work belongs;
- (6) In the case of a book the copies so deposited must be accompanied by an affidavit, under the office seal of any officer authorized to administer oaths within the United States, duly made by the person claiming copyright or by his duly authorized agent or representative residing in the United States, or by the printer who has printed the book, setting forth that the copies deposited have been printed from type set within the limits of the United States or from plates made within the limits of the United States from type set therein; or if the text be produced by lithographic process, or photo-engraving process, that such process was wholly performed within the limits of the United States, and that the printing of the text and binding of the said book have also been performed within the limits of the United

<sup>(</sup>j) Bulletin 14, 1913, § 13, p. 12.

States. Such affidavit should state also the place where and the establishment or establishments in which such type was set or plates were made or lithographic process, or photoengraving process or printing and binding were performed and the date of the completion of the printing of the book or the date of publication;

(7) In the case of all published works the actual date (year, month, and day) when the work was published.

In addition, it is desirable that the application should state for record the name of the author. If, however, the work is published anonymously or under a pseudonym and it is not desired to place on record the real name of the author, this may be omitted. In the case of works made for hire, the employer may be given as the author. By the nationality of the author is meant citizenship, not race; a person naturalized in the United States should be described as an American. An author, who is a citizen of a foreign country having no copyright in this country, if at the time of publication of his work he is a permanent resident of the United States, then the fact of such permanent residence in the United States should be expressly stated in the application. Care should be taken that the title of the work, name of the author, and the name of the copyright claimant be correctly stated in the application, and that they should agree exactly with the same statements made in the work itself.

§ 449. Unpublished Works.— There is a special provision in the copyright act which states that nothing in the act should be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.<sup>1</sup>

Notwithstanding this section of the act, however, it is also provided that copyright protection may be had for these unpublished works. Unpublished works are such as have not at the time of registration been printed or repro-

<sup>(</sup>k) Bulletin 14, 1913, § 16, p. 13.

<sup>(1)</sup> Bulletin 14, 1913, § 2, p. 9.

duced in copies for sale, or been publicly distributed. They include the following: (1) lectures, sermons, addresses, or similar productions for oral delivery; (2) dramatic and musical compositions; (3) photographic prints; (4) works of art (paintings, drawings, and sculpture); and (5) plastic works.

In order to secure a copyright in such unpublished works the following steps are necessary with reference to the de-

posit of copies:

In the case of lectures, sermons, addresses, and dramatic and musical compositions, deposit one typewritten or manuscript copy of the work. This copy should be in convenient form, clean and legible, the leaves securely fastened together, and should bear the title of the work corresponding to that given in the application. The entire work in each case should be deposited. It is not sufficient to deposit a mere outline or epitome, or, in the case of a play, a mere scenario, or a scenario with a synopsis of the dialogue.

In the case of photographs, deposit one copy of a positive print of the work. (Photo-engravings or photo-gravures are not photographs within the meaning of this provision.) In the case of works of art, models or designs for works of art, or drawings or plastic works of a scientific or technical

character, deposit a photographic reproduction.<sup>m</sup>

In each case the deposited article should be accompanied by an application for registration and a money order for

the amount of the statutory fee, to-wit, one dollar.

Any work which has been registered as an unpublished work, if reproduced in copies for sale or distribution, must be deposited a second time (two copies, accompanied by an application for registration and the statutory fee) in the same manner as is required in the case of works published in the first place."

§ 450. Duration of Copyright.— The copyright secured by the Act endures for twenty-eight years from the date of first publication, whether the copyrighted work

<sup>(</sup>m) Bulletin 14, 1913, § 11, p. 11.

<sup>(</sup>n) Bulletin 14, 1913, §§ 11, 12, pp. 11, 12.

bears the author's true name or is published anonymously or under an assumed name; provided, that in the case of any posthumous work or of any periodicals, cyclopedia, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright is entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension is made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright; and provided further, that in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedia or other composite work when such contribution has been separately registered, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin is entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension is made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright; and provided further, that in default of the registration of such application for renewal and extension, the copyright in any work determines at the expiration of twenty-eight years from first publication.º

§ 451. Infringement of Copyright.— To infringe a copyright means to encroach upon, and invade the rights of the person who owns the copyright.<sup>3</sup> It is generally said that a copyright is infringed when the whole or any material part of the copyrighted work is used and published without

the author's consent.

<sup>(3)</sup> It is not infringement to read or recite publicly the whole or any part of a copyright book properly acknowledging the authorship.

<sup>(</sup>o) Bulletin 14, 1913.

The rule in regard to infringement is clear. If the author through the legitimate exercise of his mental powers produces a work which is, on the whole, original then his copyright will stand notwithstanding that he had borrowed freely and frequently from the works of others. The test of piracy is whether the author has in fact used the plan and ideas of another as material for his own work with slight alterations or whether the author has produced a work which is the result of his independent thinking and labor. In the former case there is an infringement; in the latter case there is not an infringement.

An action for infringement of copyright can not be maintained in court until the provisions with respect to the deposit of copies and registration of such work have been

complied with.p

The Copyright Law provides at great length for liability of a person who infringes a copyright. In brief, the liability is as follows:

(1) He may be restrained from further infringement

by an injunction.

(2) He must pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement.

(3) He must deliver up on oath all articles in his pos-

session which infringe the copyright.

(4) He must deliver up on oath for destruction all infringed copies or devices, as well as plates, molds, matrices, or other means for making such infringing copies as the court may order.<sup>q</sup>

§452. Penalty for Wilful Infringement.— Any person who wilfully and for profit infringes any copyright secured by the Act, or who knowingly and wilfully aids or abets such infringement, is guilty of a misdemeanor, and upon conviction thereof is punishable by imprisonment for not exceeding one year or by a fine of not less than one hundred

<sup>(</sup>p) Bulletin 14, 1913, § 12, p. 12.

<sup>(</sup>q) Bulletin 14, 1913, § 25, pp. 17, 18.

dollars nor more than one thousand dollars, or both, in the discretion of the court; provided, however, that nothing in the Act should be so construed as to prevent the performance of religious or secular works, such as oratorios, cantatas, masses, or octavo or choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit.

- § 453. Penalty for False Notice of Copyright.— Any person who, with fraudulent intent, inserts or impresses any notice of copyright required by the Act, or words of the same purport, in or upon any uncopyrighted article, or with fraudulent intent removes or alters the copyright notice upon any article duly copyrighted is guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars and not more than one thousand dollars. Any person who knowingly issues or sells any article bearing a notice of United States copyright which has not been copyrighted in this country, or who knowingly imports any article bearing such notice or words of the same purport, which has not been copyrighted in this country is liable to a fine of one hundred dollars.\*
- § 454. Defenses to an Action for Infringement.—In an action for infringement the defendant may escape liability by proving any one of the following things:

(1) That his work is substantially the product of his

own mental efforts.

(2) That the work of the author who is bringing the suit was not original.

(3) That the work of the author who is bringing suit for the infringement, is seditious, libelous, immoral, or blasphemous.

(4) That the work of the author who is bringing suit for infringement, did not contain a copyright notice as is

<sup>(</sup>r) Bulletin 14, 1913, § 28, p. 19.

<sup>(</sup>s) Bulletin 14, 1913, § 29, p. 19.

required by law, and if the notice was omitted by error, then that the defendant has no knowledge that the author who is bringing suit has a valid copyright on such work.

(5) That the person bringing suit did not comply with

the copyright law in any other manner of importance.

### Trade-Marks

§ 455. Introduction.— The subject of trade-marks is always closely associated with patents and copyrights, hence a word will be said in regard to the law on this subject. Unlike patents and copyrights trade-marks are not dependent upon statute law for existence or protection but are, on the contrary under the protection of the common law.

Upton in his work on trade-marks defines a trade-mark "to be a name, symbol, figure, letter, form or device adopted and used by the manufacturer, or merchant, in order to designate the goods that he manufactures, or sells, and distinguish them from those manufactured or sold by another; to the end that they may be known in the market as his and thus enable him to secure such profits as result from representation for superior skill, industry or enterprise." a

§ 456. In What Acquired.— Any device or symbol may be protected as a trade-mark if it is used upon merchandise and if such device is arbitrary or fanciful in its character and selection and if it is not employed to misrepresent any fact with reference to the goods, their origin, character, or contents. Examples of valid trade-marks are the words "White Crescent" with reference to cough drops with the picture of a man holding a white crescent; "Wearever" underwear with a picture of an angel; but such words as "good" shoes or "fine" watches would not constitute a trade-mark inasmuch as these words are not arbitrary in their selection and they are merely words indicative of quality and kind of texture.

A trade-mark can not be acquired in mere general adjectives, that is, in such words as "good," "fine," "superior,"

<sup>(</sup>a) Upton on Trade-Marks, p. 9.

or "excellent." These words are common property of all people and no one man can acquire exclusive right therein.

A trade-mark must be specific, that is, it must clearly designate and distinguish the character of the goods or the character of the work done by the proprietor from the goods

or the work of other persons.

If the name of a State, town or city is used to designate goods coming from such place, no trade-mark is acquired in such names as against other persons living in the same community. All persons living in a given community have a legal right to use the name of the community to designate the product which comes from the community and no person can acquire exclusive right in such a name.

§ 457. By Whom Acquired.— Trade-marks may be acquired by any person capable of acquiring personal property provided used in connection with his business. No particular duration of time is requisite to create a property right in a trade-mark, but in order to create the right the use by the person adopting and claiming the trade-mark must be original with respect to the particular character of goods.

§ 458. Doctrine of Trade-Mark Protection.— There

is a two-fold object in favoring trade-mark protection:

(1) To reward the manufacturer or merchant who puts

on the market an article of value.

(2) To protect the public from imposition and fraud by the assurance which they get from the trade-mark that the manufacturer or merchant in whom they have confidence has marked the article in question.

If a trade-mark is infringed there are necessarily two injuries done. The manufacturer is injured by losing his reward for marketing a superior article under a given name and the public is deceived into purchasing articles from

someone in whom it has no confidence.

§ 459. Infringement.— "The violation of a trade-mark consists in the unauthorized application of it, or of colorable imitation of it, to the goods manufactured or sold by the wrongdoer, under fraudulent representation that

they are the genuine merchandise of the proprietor; whereby purchasers and consumers may be deceived and the owner of the trade-mark damnified." b

§ 460. Defenses to an Action for Infringement.— The one against whom the action for infringement is brought

may prove the following:

(1) That the person claiming the trade-mark did not manufacture or own the merchandise which was sold. The rule is that a trade-mark can not be held separate and apart from the merchandise which is sold. There is no such thing as an abstract trade-mark.

(2) That the person claiming the trade-mark is deceiving the public by use of the trade-mark. For example, if a trade-mark were meant to convey the impression that the goods are imported when in fact the goods are not imported, the plaintiff can not recover for the use of the same designation by some one else.

(3) That the trade-mark is merely a descriptive phrase which is public property and is not, as is required, an arbitrarily selected phrase which designates and distinguishes

the manufacturer of the goods.

(4) That the same trade-mark was used by others in a similar business prior to the time the person bringing suit used it and that the said latter party merely used the phrase

in imitation of such other persons.

- § 461. Remedy for Infringement.— If a party can clearly establish his trade-mark and can prove that the defendant infringed it, the injured party can obtain an injunction in a court of equity and restrain the further use of the trade-mark and he can also recover damages for the wrong done him.
- § 462. The United States Statutes.— It has been provided by Congress that a trade-mark may be registered in the United States Patent Office by any person, firm or corporation, which is the owner of such trade-mark and uses the same is lawful trade in commerce with foreign nations

<sup>(</sup>b) Smith on Personal Property, § 59, citing authorities.

or among the several States, or with Indian tribes. In order that such registration may be made a complete application must be made for it, said application comprising a petition, statement, declaration, drawing, and five specimens, and a fee of ten dollars. For violation of such registered trademarks certain special penalties are established by the Act of Congress.

Under this Act a trade-mark is registrable if it is of such a character that it may be fixed, printed upon, woven, sewed, branded or otherwise impressed upon the product on which it is used or upon the package or container of the product

and provided further the trade-mark is as follows:

(1) Individual in character, that is, not like any other trade-mark already in use and applied to the same class of goods.

(2) The business or trade-name of a person or firm when written, printed, impressed or woven in a distinctive manner or in connection with the portrait or in an autographic form.

(3) Any arbitrary symbol, word, phrase or combination of a device and a phrase not obviously descriptive of

the commodity to which it is applied.

(4) Any trade-mark which has been in continuous and exclusive use by the applicant since February 21st, 1895.

A trade-mark is not registrable if it does not conform with the requirements stated in the foregoing or if it is as follows:

(1) If it will deceive the public as to the manufacturer or makers of the goods, or the quality, composition or character of the goods or as to the origin of the goods that is the place of manufacture.

(2) Any scandalous, blasphemous or immoral matter.

(3) The insignia of the American National Red Cross Society.

(4) Any design or picture previously in use by a fra-

ternal organization as its emblem.

(5) The flag or coat of arms of any foreign nation.

(6) The flag or coat of arms of the United States or

of any State or of any municipality or any of the insignia thereof.

(7) Any geographical name or term.

(8) The portrait of a living individual unless the application for registration is accompanied by the written consent of the individual whose portrait is to be used.

# **QUESTIONS**

I. (a) Define the terms patent, copyright, and trademark.

(b) State whence Congress derives its authority to

legislate with reference to these subjects.

II. For a period of two years there was in general use in the States of New York, Massachusetts and New Hampshire a machine which washed and dried dishes. Allen working in his laboratory one day, and without knowing anything about the machine already in use, invented a machine having the identical mechanical principle of the dishwashing machine already in use. Can Allen obtain a valid patent for his invention? Why?

III. Allen invented a machine in England and patented the same. A year later Baker, living in the United States, invented the same kind of a machine. Baker worked independently and had no knowledge of Allen's invention. Can Baker obtain a valid patent in the United States for his

invention?

IV. A tri-color mixing machine was invented by Allen, a citizen of the United States, on January 1st, 1914. On February 1st, 1914, Allen applied for a patent for said machine in England. On March 1st, 1915, Allen applied for a patent on said machine in the United States. Can he obtain a valid patent therefor in the United States? Why?

V. By a long series of experiments Allen produced a composition of chemicals which, when properly

mixed with oils, was a first-class one-coat paint. Fearing that if he patented the result of his experiments others would infringe his patent, Allen manufactured such paint in his own factory and sold it to the public for a period of three years. Allen concluded then to patent his invention, and accordingly applied therefor. Can he obtain a valid patent?

VI. (a) Who may obtain a patent? A copyright?

trade-mark?

(b) For how long a period is a patent granted? copyright? A trade-mark?

VII. How is a patent obtained? A copyright?

trade-mark?

VIII. (a) How are patents infringed? Copyrights? Trade-marks?

(b) What rights have the owners, respectively, of patents, copyrights, and trade-marks, against those who infringe?

What defenses can be made by one sued for infring-IX. ing a patent? A copyright? A trade-mark?

(a) For what works cannot a copyright be ob-X tained?

(b) What exclusive rights does one have to patents? To copyrights?

(c) What is the meaning of the term "publication" in copyright law?

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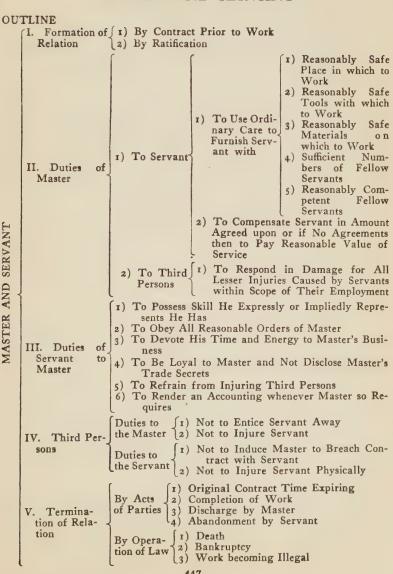
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# CHAPTER XXVI MASTER AND SERVANT



§ 463. Introduction and definitions

§ 464. Basis of liability of a master
§ 465. Duties of master to servants
§ 466. Duties of servants to master
§ 467. Responsibility of master to third persons
§ 468. Responsibility of servant to third persons

§ 469. Responsibility of third persons to master and servant

§ 470. Responsibility of master to servant for failure to provide protection

§ 471. Responsibility of servant to master and fellow servant

Introduction and Definitions.— It was stated in the opening paragraph in the chapter on "Agency" that "men may be employed, generally speaking, for one or both of two purposes: First, to represent their employers with power of entering into contracts on behalf of those employers, and, second, to do purely mechanical or operative acts for those whom they serve. When an individual is acting for his employer in the first capacity he is said to be an agent; when he is acting in the second capacity he is said to be a servant." A servant may, therefore, be defined as a person employed by someone else — called the Master - to perform mechanical or operative acts.

It often happens that a person is employed to perform both the duties of an agent and of a servant and in such an event the law of Agency will apply when he is acting in the former capacity and the law of Master and Servant when he is acting in the latter relationship. Thus in some places a conductor of a train or street car acts in both capacities. He is an agent in selling tickets to passengers for he is making contracts on behalf of the company; he is a servant when he collects tickets which passengers have bought previously, and when he helps people get off and on the train

§ 464. Basis of Liability of a Master.— The relation of master and servant like that of principal and agent is usually the outcome of a contract entered into between the superior

<sup>(</sup>a) Ante, § 186.

and the inferior in the relationship. An essential difference exists, however, as to the liability of the principal and of the master in relation to third persons. In agency the eliability of the principal to third persons is one that involves or rests upon contractual grounds. The agent is employed and authorized to make representations and enter into contracts on behalf of his principal with third persons and the principal is very naturally held liable on such contracts. In the relation of master and servant, however, the servant is employed to do operative or mechanical acts and not to enter into contractual relations with third persons. The master is therefore brought into relationship with third persons only because of some wrongful or tortious act of the servant whereby such third persons are injured. The liability of the master is not based on contractual grounds for, indeed, he has made no contract with third persons for which they can hold him liable. It would be manifestly unfair, however, to permit the master who, legally considered, has control of the servant to escape liability for the wrongful act of the servant. The law, therefore, holds the master liable on the ground that he who has the instrumentality under his control must bear the responsibility for the damage done, or as the maxim runs, respondeat superior,—let the superior be accountable or answerable.

§ 465. Duties of the Master to the Servant.— It has been previously stated b that a principal owes an agent, the duties of compensation, reimbursement, and indemnity. These duties are also owed by a master and in addition thereto a master is bound to use due care to provide and maintain the following:

(1) A sufficient number of other competent servants.

(2) A safe place in which to work; a safe article on which to work, and safe tools and appliances with which to work.

(3) Sufficient inspection of the premises and the appliances.

<sup>(</sup>b) Ante, § 205.

(4) Such supervision and general orders and rules as are necessary for the safety of all the servants.

(5) Sufficient warning of any unusual or extraordinary

danger or risk which is not plainly noticeable.°

#### **EXAMPLES:**

- r. Allen, the proprietor of a laundry, had in his place of business a mangle, which is a large mechanical ironing machine, at which women worked. He provided no guard on this mangle and, moreover, the lever which was provided on the machine to shut off the power in the event of danger, was out of order. Miss Baker, who worked for Allen, had her hand caught in the machine and because of the failure of Allen to provide a guard and because of the condition of the lever, her hand was crushed. She can recover against Allen for her injuries.
- 2. Allen, the proprietor of a lumber yard, had in his employ one Baker. Allen instructed Baker to lift a large piece of timber and to carry it to the other end of the yard. Baker told Allen he should have some one help him because the timber was very heavy. Allen replied that Baker would have no trouble in lifting the timber and that he should proceed with the work. Accordingly, Baker did proceed with the work with the result that on account of the weight of the timber he dropped it and crushed his foot. Baker could recover against Allen.
- § 466. Duties of Servant to Master.— A servant may be said to owe the same duties to his master as an agent owes to his principal.
- § 467. Responsibility of Master to Third Persons.—A master is liable to third persons for injuries caused them by the negligence and wilful acts of his servant, provided those acts take place in the course of the employment and while the servant was attending to his master's business.

## **EXAMPLES:**

- I. Allen sent his servant, Baker, to dig a ditch on Blackacre. It so happened that while Baker was on his way to Blackacre he espied Carter, his old enemy. Baker forthwith assaulted and badly
  - (c) Cf. Huffcutt on Agency, § 376.

injured Carter. Allen could not be held liable for this injury, inasmuch as Baker was not attending to his master's business in assaulting Carter nor was Baker using any instrumentality of his master. Baker would, of course, be liable for his own wrongful conduct.

2. Baker was the driver of Allen's grocery wagon. Allen directed Baker to drive from Fourth and Washington Avenue to Tenth and Washington Avenue. This was a direct route but inasmuch as Baker wished to purchase some tobacco for his own use he first drove over to Sixth and Locust Street, a block south of Sixth and Washington Avenue, intending after he bought the tobacco to drive back to Sixth and Washington Avenue and thence to drive direct to Tenth and Washington Avenue. On the course of his drive from Sixth and Washington Avenue to Sixth and Locust Street, Baker negligently drove his horse and wagon over Carter, who sued Allen for the injury. Allen would probably be liable. In the case of Ritchie v. Waller, 63 Conn. 155, the Court said: "In such cases it is, and must usually remain, a question depending upon the degree of deviation and on the attendant circumstances. In cases where the deviation is slight and not unusual the Court may, and often will, as a matter of law, determine that the servant was still executing his master's business. So, too, where the deviation is very marked and unusual, the Court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact to be left to the jury."

§ 468. Responsibility of Servant to Third Persons. — The general rule is that the servant is responsible to third persons for any injury caused them by his wrongful conduct,— either negligently performing that which he may as lawfully do, or doing in a totally improper manner that which he may lawfully do, or doing something entirely improper.

A servant is not liable, however, to third persons for simply failing to perform a contract which he (the servant) has made with his master. This is due to the fact that third persons have nothing to do with the servant's contracts with his master, as they can hold a servant liable only because of some tort which the servant has committed on them.

§ 469. Responsibility of Third Persons to Masters and

to Servants.— A third person is liable to a master for any injury to the servant whereby the master is temporarily deprived of the services of the servant. If third persons induce a servant to break a contract with a master and therefore leave the employment of the master such third persons will be liable to the master for such conduct.

A third person is liable to a servant for any injury caused him regardless of the liability of such third person to the master for the loss of the services. A third person is also liable to a servant if such third person wrongfully induces the master to discharge the servant with whom the master had a contract for a definite period of time.

§ 470. Responsibility of Master to Servant for Injury Caused Servant.— Under the paragraph in this chapter entitled "Duties of a Master" there were set forth five principal duties of a master. These duties a master must fulfill and if he fails to do so and the servant is injured because of such neglect the master will be liable for the injury done. A master cannot escape liability for these duties by delegating them to any one else. If a master either expressly or impliedly delegates to some one else any of the foregoing proprietary duties, the person to whom said duties are delegated is said to be a vice-principal for whose acts the master is fully liable not only to third persons but also to all his servants.

Unless otherwise provided by statute, if a master faithfully fulfills the foregoing five duties he is not responsible to the servant for injuries caused such servant by the torts of fellow servants, that is, by the servants in the same common service. The reason ordinarily given for this rule is that there is an implied provision in each servant's contract that he assumes all the ordinary risks of the employment on which he enters.

### **EXAMPLES:**

Unless otherwise provided by statute, if the master faithfully fulfills the foregoing five duties he is not responsible to the servant for injuries caused by a tort of fellow servants; that is, by servants

in the same common service; but who are fellow servants has given rise to much litigation. The fellow servant doctrine as announced in the early cases prevented the servant from recovering if his injury was occasioned by an act of a fellow servant, who was employed by the same master, under the same control and performing duties and services for the same general purposes.d This early doctrine has been greatly modified. "When the law of fellow servants was first announced, business enterprises were comparatively small and simple. The servants of one master were not numerous. They were all engaged in the pursuit of a simple and common undertaking. Now things have changed. Large enterprises are conducted by persons or by corporations employing vast numbers of servants, divided into classes, each pursuing a different portion of the work, and each practically independent of the other. The old reasons do not apply to the new conditions." e "It is just as true to-day as it was in earlier times that all employees are to be considered fellow servants who are so associated in their work as to come into contact with one another and have an opportunity to know each other's characteristics. But it is no longer true that all are to be deemed fellow servants who serve the same employer in the accomplishment of the same general end. By the great majority of courts it is now recognized that an employee is entitled to recover for injuries caused by another employee of the same master whenever it appears that the injured employee had no knowledge of the offender's qualifications or characteristics, either actual or such as may be imputed from continued association and contact in the performance of their services." f

Under the Federal Employers' Liability Law, which has application to employees injured in interstate commerce for common carriers by railroad who are engaged in interstate commerce, the fellow servant rule is abrogated.<sup>g</sup>

In those states having Workmen's Compensation Laws, the fellow servant rule no longer has any application because all employees who come under the provisions of the law are entitled to receive the benefits provided regardless of the question of negligence.

# § 471. Reponsibility of Servant to Master and to Fel-

- (d) 18 R. C. L.; p. 223 et seq.
- (e) Union Pac. Ry. Co. vs. Erickson, 41 Nebr. 1.
- (f) R. C. L., p. 758.
- (g) Thornton's Federal Employers' Liability Act, p. 1.

low Servants.— A servant is liable to his master for any wrongful or negligent acts which such servant commits. A servant is liable to his fellow servants for any negligent or wrongful performance of his duties whereby such fellow servants are injured.

# **QUESTIONS**

I. Differentiate between the purpose for which an agent is employed, and that for which a servant is hired.

II. What Latin maxim is particularly applicable to the law of master and servant? Is the liability of a master based on contractual principles?

III. Enumerate the duties of a master to his servant,

and those of a servant to his master.

IV. Allen was in the grocery business. He had in his employ Baker, who acted as a driver on Allen's wagon and also as a salesman to take orders. Baker called at the house of Carter to deliver certain groceries. During the course of a conversation with Carter relative to these groceries, Baker, without cause, struck Carter and injured him. Is Allen liable to Carter for this wrong? Give reasons.

V. In the case given in question IV do you think Baker

would be personally liable to Carter?

VI. Allen conducted an automobile garage in the City of St. Louis. He had Baker working for him in the garage. Carter kept his automobile in Allen's garage. One day when Carter called for his automobile he was dissatisfied with something about the automobile, and, in anger, he struck Baker and injured him. Is Carter liable to Allen for this assault? Is he liable to Baker?

VII. Allen was the owner of a machine shop, in which there were many machines of different types.

The law required the owners of machine shops to provide iron guards so that the employes would

be protected in a measure from injury by contact with the machines. Allen failed to provide these guards in his shop, and, due to this, Baker, an employe, was injured. Would Allen be liable to Baker for his injuries?

- VIII. Allen conducted a paper cutting establishment, in which it was necessary to use very sharp knives, which were especially dangerous to those who were required to handle them. There was a method of making the use of these knives safer by providing a certain kind of handle, but there was no law requiring this, and Allen did not provide this additional safety. Baker, a young boy, went to work in Allen's establishment on Monday morning, January second, at eight o'clock. He knew nothing whatever about paper cutting machines, and he was not warned that the knives were dangerous. Shortly after Baker went to work he was injured in the use of one of the knives. Would Allen be liable to Baker for these injuries? Suppose Baker had been an experienced man in the paper cutting business, and he knew at the time of his employment that Allen did not have the additional safeguards mentioned in the foregoing in his establishment, - would this make any difference? Do you think it ought to make any difference?
  - IX. Suppose a servant neglects his duties and thereby injures a fellow-servant. Is the negligent servant liable for his act in an action brought by the injured fellow-servant? Is the master liable?

X. Suppose a servant neglects his duties and thereby causes loss to his master. Is the servant liable to the master for the neglect?

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### CHAPTER XXVII

### **DAMAGES**

OUTLINE			
	I.	In General	Definition Functions of Judge and Jury
DAMAGES	II.	Nominal Damages	
	III.	Substantial Damages	Must Be Direct or Proximate Consequential Must Be Certain May Be Liquidated Must Not Be Avoidable
	IV.	Measure of Substantial Damages	In Contracts In Torts
	V.	Exemplary Damages	

### Part I - In General

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- § 474. Classification of damages

## Part II - Nominal Damages

§ 475. When granted

## Part III - Compensatory Damages

- § 476. Theory of compensatory damages
- § 477. When awarded
- § 478. Definition and distinction
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## Part IV - Certainty of Damages

- § 481. Rule
- § 482. Liquidated damages and penalties

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§ 483. General rule

## Part VI - Measure of Damages

#### A. In Contract Actions

§ 484. In sales§ 485. In loans

### B. In Torts

§ 486. In personal injury cases

§ 487. In conversion

§ 488. Injury to personal property

# Part VII - Exemplary Damages

§ 489. In contracts

§ 490. In torts

### Part I. In General

§ 472. Introduction and Definitions.— Damages include a study of the "pecuniary compensation or indemnity which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his personal property or rights, through the unlawful act or omission or negligence of another." a

Again damages may be defined as the "pecuniary satisfaction which the plaintiff may obtain by success in an

action" at law.b

- § 473. Functions of the Judge and Jury.— In the early stages of English law the juries were composed entirely of people who knew all about the facts. In those days (about 1605) the judge could not control the damages (except in cases involving contractual rights) 1 and damages at large were given, that is the jury had almost unlimited power in the matter of the sum they would grant. Later on, however, the rule came to be that the jury had to give the reasons on which they based their verdict if requested to do so
- (1) It seems that in cases involving contractual rights, even in the very earliest cases the judge had the jurisdiction to control the damages and instruct the jury as to the rights of the parties. Hunt v. J. Common Pleas, 1319, Beale's Cases on Damages, p. 1.
  - (a) Black's Law Dictionary: Damages.
  - (b) Wood's Main on Damages, § 1.

by the judge. And then the rule sprang up that if the injured person could be brought into court so that the injury could be viewed, the judge could increase the verdict if he believed the jury's verdict to be too small. In a case decided in 1622 it was held by the court of King's Bench that a judge could set aside the verdict of a jury if he ascertained that the jury had reached their verdict by tossing a coin or throwing dice.<sup>c</sup>

In the early English cases it was held that a new trial would not ordinarily be granted on account of the smallness or excessiveness of the damages except when at first blush such damages appeared outrageous. But it was finally held by the Court of Appeals, in England, in 1879, that where the damages (in a personal injury case) were so small that it was evident the jury must have left certain elements out of consideration, a new trial should be granted. Lord Justice James said:

"The verdicts of juries as to the amount of damages are subject, and must for the sake of justice, be subject, to the supervision of the court of first instance, and if necessary to a court of appeal in this way; i. e., if in the judgment of the court the damages are unreasonably large or unreasonably small, then the court is bound to send the matter for

reconsideration by another jury." d

In the United States the rule is laid down that in personal injury cases the judgment of the jury must not be disturbed unless it appears from the testimony that the damages awarded are manifestly so grossly disproportionate to the injury that in awarding them the jury must have been influenced by a perverted judgment; and our courts do not increase the amount of damages. If the amount is considered manifestly too small a new trial is granted. In some States if the verdict of a jury is considered excessive either by the trial court or by the appellate court, a remittitur is ordered; i. e., the court directs that if the person to whom

<sup>(</sup>c) Hawkins v. Sciet, Palmer 314; Beale's Cases on Damages, p. 2.

<sup>(</sup>d) Phillips v. London & S. W. Ry. Court of Appeals (1879), 5 Q. B. Div. 78; Beale's Cases on Damages, p. 8.

the damages have been awarded will voluntarily release his right to a portion of the damages the verdict may stand, otherwise a new trial will be granted. This is not the rule in the United States courts. It is not a commendable practise. Either the verdict of the jury should stand as given or the court should declare that the jury was acting with passion or prejudice and the whole verdict should be set aside.

§ 474. Classification of Damages.— Damages may be classified as nominal, compensatory, and exemplary. Nominal damages are damages existing in name only, that is damages in a very small sum, such as one cent or five cents, or one dollar and are not awarded as compensation for any actual injury but merely in recognition of the technical violation by the defendant of a legal right of the plaintiff.

Compensatory, substantial or actual damages are those damages which are substantial in amount and which are intended as fair compensation to the plaintiff for a real in-

jury done him by the defendant.

Exemplary, vindictive, or punitive damages are those extra damages which are awarded against the defendant not only as a compensation to the plaintiff but also as a punishment to the defendant. In contract cases of breach of promise to marry and in tort actions involving malice, oppression, gross negligence or violence, exemplary damages may be awarded.

We will now consider briefly some of the rules belonging to these three classes and incidentally we will treat some of the rules by which the juries are guided in awarding sub-

stantial damages.

# Part II. Nominal Damages

§ 475. When Granted.— Nominal damages are given for any infringement of a right which infringement has resulted in no actual damage. Being given in vindication of a legal right the doctrine "de minimis non curat lex" (the law does not concern itself with trifles) does not apply.

Nominal damages are awarded as follows:

1. Whenever the injury to the plaintiff has not been wantonly, recklessly or maliciously inflicted provided the injury has not resulted (1) in actual pecuniary loss or (2) in pecuniary loss which can be estimated with reasonable certainty from proved facts; or,

2. Whenever the infringement of the plaintiff's right

has been beneficial to him.

In some States the giving of nominal damages to the plaintiff, nothing more being said, does not of itself determine who shall pay the costs. If in a decision of a court in such a State, nominal damages only should have been given to the plaintiff, and if the verdict was wrongfully given for the defendant the court will not reverse the case for error. But in those States in which a verdict for nominal damages carries with it of itself the costs, then if the verdict is wrongfully given to the defendant where the plaintiff should have been given nominal damages, the case will be reversed for this error.

By the weight of authority exemplary damages cannot be given in those cases where the plaintiff has been awarded only nominal damages, except in cases of breach of promise to marry.

# Part III. Compensatory Damages.

§ 476. Theory of Compensatory Damages.— The theory upon which damages are awarded in civil cases is that they are a money compensation to the person injured, except in certain cases in which nominal damages are given and in certain other special cases where exemplary damages are allowed.

The right to damages is a property right which arises immediately upon the commission of a wrongful act.<sup>f</sup>

- § 477. When Awarded.— Compensatory damages are awarded only (1) when they are direct or proximate conse-
  - (e) Hall on Damages, § 2.
  - (f) II Blackstone's Commentaries, \*438.

quential, (2) when they are certain, and (3) provided they are not avoidable. These three subjects will now be considered.

# Direct and Consequential Damages

§ 478. Definitions and Differentiation.— "Direct" damages are those damages which necessarily result from the commission of a wrongful act. Direct damages are such as follow immediately upon the act done. They are those so closely connected with the wrong complained of that they may be said to be involved in the assertion of the right of action. If one commits a wrongful act one is liable for all the direct damages which follow regardless of whether or not they could have been foreseen.

"Consequential" damages are those damages which do not flow directly or immediately from the act of the party but only from some of the consequences or results of such act. Consequential losses are the indirect losses caused by a wrong, but to which some intermediate cause has con-

tributed.i

"Consequential" losses may be either proximate or remote. "Consequential" losses are proximate when the natural and probable effect of the wrongful conduct, under the circumstances, is to set in operation an intervening cause or causes from which the loss directly results. Consequential losses are remote when there is a lack of direct connection between the wrong and the injury; i. e., when an independent intervening course produces the injury and not the original wrong.

§ 479. In Torts.— If upon the commission of a wrongful act a loss results but if said loss is not due directly to the wrongful act but is due to some independent intervening cause which was not caused or set in motion by the original

(g) Ga. Code 1882, § 3071.

(h) Cf. Sedgwick on Damages, § 871.

(i) Black's Law Dictionary; also Hale on Damages, §§ 21-25.

(j) Hale on Damages, § 26.

wrongful act then the loss must be considered a "consequential remote" one and no recovery may be had.

### **EXAMPLE:**

1. It was the duty of the city of Dubuque to keep its bridges in good repair. On one occasion the city failed to comply with this duty. The Dubuque Lumber Company had a large quantity of lumber along the bank of the river. It waited to haul its lumber away until the city of Dubuque would repair its bridges. In the interim a flood carried off the lumber. Inasmuch as the flood was an independent intervening cause the lumber company could not recover from the city for the loss of the lumber. Dubuque Lumber Co. v. City of Dubuque, 30 Ia. 176.

The rule, in torts, then is that one is always liable for all "direct" and all "proximate consequential" losses which result from a wrong but not for remote consequential losses. If the original act was wrongful and would naturally, according to the ordinary course of events, prove injurious to some person or persons, and does actually result in injury either directly or through the intervention of other causes which are not independent, the one doing the original act will be liable for all the loss which results.<sup>k</sup>

§ 480. In Contracts.— The rules by which the courts are guided in contract cases involving the question of direct and consequential damages were concisely stated in the case

of Hadley v. Baxendale, 9 Ex. 341.

This was an action by the owners of a steam grist mill against the defendant, a carrier, for loss of profits caused by the carrier's delay in delivering a mill shaft, which belonged to the plaintiff, to an engineer who was to supply a new mill shaft for plaintiff's mill. The court said in substance:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be as follows:

<sup>(</sup>k) Rich v. N. Y. R. R., 87 N. Y. 382.

(1) Such damages as may fairly be considered to arise naturally, that is, according to the usual course of things from such breach of contract itself. (These are called direct damages.)

(2) Such damages as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as a probable result of the breach of it.

These are termed proximate consequential damages.

"Now if the special circumstances in which the contract was actually made were communicated by the plaintiffs to the defendant and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of the injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."

Applying the rules as thus stated to the case at hand the court held that the loss of profits and cause of the delay could not be taken in account in estimating the damages for failure to deliver the mill shaft as agreed, inasmuch as the only circumstances communicated by the plaintiffs to the defendant at the time the contract was made, were, "that the article to be carried was a broken shaft of the mill and that the plaintiffs were the millers of that mill." If the plaintiffs had had another mill shaft, the loss of profits would not have taken place, so that if they had wished to recover special damages in a case of negligence on the part of the defendants, they (the plaintiffs) should have communicated the fact to the defendants at the time of making the contract that they (the plaintiffs) had only one such shaft and that its loss would cause special damages.

# Part IV. Certainty of Damages

§ 481. Rule.— Damages are recoverable only when evidence is sufficient to make certain their ascertainment. No matter how direct or how proximate consequential the damages, there can be no recovery if the amount of damages is

wholly uncertain. One can not recover mere speculative profits. In some classes of cases, however, where probable profits are capable of fairly clear ascertainment or calculation, they are allowed. Generally it may be said that the profits which depend upon fluctuations of the market or hazard of business undertakings are too impossible of a reasonable correct estimation, hence are not recoverable. But where there are some definite criteria, as data of the market value, or other substantial evidence to compute the amount of loss with reasonable certainty, under particular instructions from the judge, then the jury can assess the amount of the damages.

### **EXAMPLE:**

Allen loaned Baker \$200 for a period of two months. At the end of the two months Baker failed to return the money. After waiting one month longer Allen brought suit against Baker for \$250. Allen attempted to show at the trial that if Baker had returned the \$200 on the time agreed upon he, Allen, would have been able to invest the money in a business dealing whereby he, Allen, would have made \$50. Allen cannot recover this \$50. He can only recover the \$200 plus the interest at the legal rate for the time the money was detained. Cf. Staal v. Grand Co., 107 N. Y. 625.

§ 482. Liquidated Damages and Penalties.— Often in order to avoid any question about the certainty of damages, the parties, in drawing up a contract will stipulate that a certain sum of money shall be paid in case either party defaults in the performance of its terms. The question which usually arises after a breach of the contract is whether the sum so stipulated to be paid in case of default should be considered by the courts as so-called "liquidated damages" or a "penalty." If considered liquidated damages then the amount stipulated must be paid in full. On the contrary, however, if considered to be a penalty, then, the judge will disregard the amount stipulated for in the contract and will instruct the jury to decide from the evidence what they believe the amount of damages actually sustained, if ascertainable, which sum can be recoverable.

"In determining whether the sum, which the contracting parties have declared payable on default in performance of their contract, is to be deemed a penalty or liquidated damages, the general rule is that the agreement of the parties will be effectuated. Their agreement will be ascertained, however, by considering, not only particular words in their contract, but the whole scope of their bargain, including the subject to which it relates. If, on such consideration, it appears that they have provided for larger damages than the law permits, e. g., more than the legal rate for the non-payment of money, or that they have provided for the same amount of damages for the breach of any one of several stipulations, when the loss resulting from such breaches clearly must differ in amount, or that they have named an excessive sum in a case where the real damages are certain or readily reducible to certainty by proof before a jury, or a sum which it would be unconscionable to award, - under any of these conditions the sum designated is deemed a penalty. And if it be doubtful from the whole agreement whether the sum is intended as a penalty or as liquidated damages, it will be construed as a penalty, because the law favors mere indemnity; i. e., the law favors the award of the amount of loss actually suffered as determined from the facts. But when damages are to be sustained by the breach of a single stipulation, and they are uncertain in amount and not readily susceptible of proof under the rules of evidence, then if the parties have agreed upon a sum as the measure of compensation for the breach, and the sum is not disproportionate to the presumable loss. it may be recovered as liquidated damages." 1

"The tendency and preference of the law is to regard stated sums as a penalty, because actual damages can then be recovered, and the recovery limited to such damages. This tendency and preference, however, does not exist when the actual damages cannot be ascertained by any standard.

<sup>(1)</sup> Monmouth Park Assoc. v. Wallis Iron Works, 55 N. J. L. 132.

A stipulation to liquidate damages in such cases is considered favorably." m

#### **EXAMPLES:**

- I. Allen, an employer, entered into a written contract with Baker, an employee, whereby Allen employed Baker for one year. One of the terms of the contract provided that in the event that either party desired to terminate it within said one year period, he could do so by giving 30 days notice in writing to the other party in the contract. Another provision was to the effect that in the event the contract was terminated for any cause, Baker could not work for any other concern engaged in the same business in which Allen was engaged, in the same city, for two years from the date of the making of the contract, and if he did so engage, he would be liable to Allen in the sum of \$2,000. Another provision stipulated that if the contract was terminated from any cause whatsoever, and if Baker disclosed any information which he obtained while in Allen's employment, Baker would be liable to Allen in \$2,000. Another provision stipulated that upon the termination of the contract for any cause, Baker should immediately deliver up all papers in his possession and if he failed to do so, he would be liable in the sum of \$2,000. These provisions for \$2,000 each would be construed as a penalty, because the same sum is provided to be paid for the failure of three different offenses, which are of unequal importance and it is, therefore, clear that the sums of \$2,000 should be treated as penalties, out of which the court should determine what the actual loss was.
- 2. Allen, who was engaged in the automobile business, sold out to Baker and agreed in the contract of sale that he would not engage in the automobile business in the City of St. Louis for the period of one year from date of sale and if he did so engage, he would pay to Baker as liquidated damages, \$1,000. This sum would probably be construed to be liquidated damages and not a penalty because when one sells out his business, the purchaser is entitled to reasonable protection.

# Part V. Avoidable Consequences

- § 483. General Rule.— Whenever the plaintiff has been injured by the defendant's breach of contract or tort, it is
  - (m) Sutherland on Damages, § 490.

the plaintiff's duty to avail himself of all reasonable measures to prevent an increase of the damages. All loss resulting from the plaintiff's failure to avail himself of preventive measures are not recoverable. But all that it is necessary for the injured party to do is to use ordinary and reasonable care to avoid increasing the damages.

### EXAMPLE:

Allen owned Whiteacre about which he built a fence. Baker wilfully destroyed a portion of Allen's fence. Although Allen knew of the destruction of the portion of his fence, yet he made no effort to repair the fence. Nor did he sue Baker for the damage done. Six months later the cattle of Carter got into Whiteacre through the portion of the fence which Baker had torn down and destroyed Allen's wheat crop. Allen brought suit against Baker not only for the wilful damage done to the fence but also for the damage done by Carter's cattle. Allen could recover for damages done to the fence but he could not recover for the damage done by the cattle, inasmuch as he had ample time to repair his fence and he could thereby have avoided the consequences of Baker's wrongful act. Cf. Loker v. Damon, 17 Pick. (Mass.) 284.

# Part VI. Measure of Damages

### A. In Contract Actions

§ 484. In Sales.— In cases of breach of contract by the vendor where he fails to deliver the articles as agreed the measure of recovery is the amount it takes to put the vendee in the same position as if the contract had been fully performed. This amount is ordinarily the difference between the contract price and the market price on the day when the delivery should have been made. So, too, when the vendor is ready to perform and the vendee refuses to fulfill his contract the measure of damages is ordinarily the difference between the contract price and market price on the day when the delivery was due.

In an action for a breach of warranty for the defective condition of an article purchased, the measure of damages is the difference between the value of the article with its defects and the value of it had it been as warranted. § 485. In Loans.— Whenever a stipulated sum of money becomes legally due and it is the defendant's duty to pay, he becomes liable for such sum plus the legal rate of interest in the particular State where the suit is brought from the day of default to the day of trial."

## B. In Torts

§ 486. Personal Injury Cases.— In personal injury cases the injured party can recover damages (1) for loss of time, (2) for all reasonable expense incurred, (3) for mental pain and suffering, (4) if permanently injured then for the impairment of his earning capacity in the future, and (5) exemplary damages in some classes of cases.°

§ 487. In Conversion.— Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights. In cases of conversion the plaintiff can recover the value of the property at the time of the conversion plus interest

at the legal rate to the day of the trial.

§ 488. Injury to Personal and Real Property.— In cases of injury to personal property the plaintiff can recover the difference between the value of the property before the injury and the value after the injury. In case the personal property was an animal and the owner made a reasonable effort to have the animal cured then, notwithstanding that the animal died, the plaintiff can recover not only the value of the animal but also the expenses reasonable in attempting to have the animal cured but said expenses must not be more than the value of the animal. In some cases exemplary damages can also be recovered.

In cases of injury to real property the plaintiff can recover all the loss sustained. If the plaintiff incurred expense in an endeavor to lessen the loss, as, for example, the plaintiff hired ten men to help him fight the fire which had

<sup>(</sup>n) Black's Law Dictionary: Conversion.

<sup>(</sup>o) See Exemplary Damages, § 458.

<sup>(</sup>p) See Exemplary Damages, § 458.

been started by the defendant, the plaintiff can also recover for such expense. In some cases exemplary damages will be allowed.

# Part VII. Exemplary Damages

§ 489. In Contracts.— The only class of contract cases in which exemplary damages are allowed are those involving a breach of promise to marry. In all other contract actions the law decrees that compensation only may be had and that no punishment by way of money may be allowed.

§ 490. In Torts.— Exemplary damages may be allowed in all cases of torts in which either fraud, malice, gross negligence, violence, oppression, or reckless conduct can be

shown.

The master is liable in exemplary damages for the wilful and wanton torts of this servant if the servant is acting within the scope of his employment, provided the master either expressly or impliedly approves or ratifies the act.

### **EXAMPLES:**

1. Allen deliberately assaulted Baker, striking him in the face and knocking him down and kicking him after he was lying on the ground. Baker is entitled to recover both actual and punitive damages.

2. Allen caused the arrest of Baker on a false charge that Baker had stolen money. Baker was released by the police, because it was clearly shown that he was not guilty and that Allen had done this to satisfy a feeling of ill will which he bore Baker. Baker can recover both actual and exemplary damages from Allen.

# **QUESTIONS**

I. What are the respective functions of judge and jury in an action at law for damages? Do you think it proper that there should be such a division of powers? Why?

II. If a party has suffered a legal wrong but has sustained no actual damages can he recover in an

action against the wrong-doer? If so, what is

the measure of his damages?

III. Allen and Baker made a contract that in consideration of one hundred dollars paid Allen by Baker, Allen agreed that he would not open a drug store within five blocks of the place where Baker had his store. Allen violated the terms of his contract. It was impossible to calculate the amount of loss or damage, if any, suffered by Baker. Do you think Baker can recover for the breach of contract? If so, what amount can he recover? Give reasons.

IV. Baker negligently ran his automobile into and over the body of Allen, and seriously injured Allen. What is the measure of Allen's damages? Do

you think this is just? Give reasons.

V. Allen struck Baker in the face and knocked him down. As Baker fell he struck his head upon a very sharp stone, and badly cut himself. Baker sued Allen for damages and seeks to recover for the injuries to himself. Allen sets up as a defense that if Baker's head had not struck the stone he would not have been seriously injured by the blow. Is this a valid defense? Give reasons.

VI. Allen in anger deliberately broke down Baker's kitchen door with an axe. Baker did not have his door fixed. About six weeks later some thieves broke into Baker's home, through the kitchen door, and stole many valuables. Baker sued Allen for all the loss sustained by him, both from the breaking down of the door and for the damage caused by the theft. Can he recover from Allen for both of these wrongs, or for either of them? Why?

VII. Allen owed Baker \$1,000. Allen agreed that if he did not pay his debt in ten days that he would pay Baker \$100 per day for every day's delay.

Allen failed to pay the debt on the day when due, but he tendered Baker the \$1,000 and the legal rate of interest two days after the debt was due. Baker refused to accept the tender and sued Allen for the \$1,000, plus the \$200, which Allen agreed to pay because of the delay. Can

Baker recover? Why?

VIII. Allen threw a stone at Baker and badly wounded Baker. Baker picked up the stone and kept it. A few hours later Baker threw the same stone at Carter and wounded Carter. Carter sued Allen for the injury, on the theory that it was the same stone which Allen had a few hours before thrown at Baker. Can Carter recover from Allen? Can

Carter recover from Baker? Why?

IX. Allen threw a bomb at Baker. Baker had a cane in his hand and when he saw the bomb coming through the air towards him he threw up his cane and in the excitement knocked the bomb across the street where it exploded and seriously wounded Carter. Carter sued Baker for the injury. Can he recover? Suppose Carter sued Allen,— could he recover?

X. What are exemplary damages? Give two original illustrations showing when they are recoverable.

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### CHAPTER XXVIII

#### **EVIDENCE**

OUTLINE Definition Oral Testimony Sources of Evidence Documents Concrete In General Judicial Notice Evidence Partially or Confessions Totally Unnecessary Admissions Burden of Proof Persons Offering Evidence Must Be Competent Legally to Testify: Idiots - Insane Very Young Child Husband and Wife EVIDENCE This excludes Attorney and Client Priest and Penitent Physician and Patient One Party to a Contract or Cause of Action if the Other Is Dead III. Evidence Must Be of the Witness's Own Knowledge Hearsay This Excludes \ Opinions Character IV. Evidence Must Be Material and Relevant Best Evidence Parol Evidence Special Rules in Regard to Written Instruments Alterations Spoliation of Evidence

## Part I - In General

- § 491. Definitions and explanations
- § 492. Sources of evidence
- § 493. Judicial notice
- § 494. Confessions
- § 495. Admissions
- § 496. Burden of proof

# Part II — Persons Must be Competent to Testify

§ 497. General rule

- § 498. Mental incapacity
- § 499. Criminals
- § 500. Relations of trust
- § 501. Death of one party to a contract or cause of action

# Part III — Evidence Must be of the Personal Knowledge of the Witness

- § 502. Rule and explanations
- § 503. Hearsay evidence
- § 504. Declaration in pedigree cases
- § 505. Dying declarations
- § 506. Regular entries in the course of business
- § 507. Representation on matters of public improvement
- § 508. Declarations against interest
- § 509. Regular, official, and commercial publications: learned treatises
- § 510. Opinion rule

### Part IV - Materiality and Relevancy

§ 511. Definitions and explanation

# Part V — Special Rules in Regard to Written Instruments

- § 512. Introduction
- § 513. Best evidence rule
- § 514. Parol evidence
- § 515. Spoliation and alterations of a written instrument

## Part I. In General

- § 491. Definition and Explanation.— The word "evidence" in legal phraseology includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. To prove a fact means technically to produce conviction in the mind of some other person that the fact is as one states it to be. The means of producing this conviction, whether it be through the medium of witnesses, documents, or concrete objects is
  - (a) Greenleaf on Evidence, § 1.

evidence; and the law of evidence has to do with that body of rules which determine whether or not the court will receive the evidence which is offered.

- § 492 Sources of Evidence.— There are three different sources of evidence:
- (1) That which is received from the mouth of a witness.
- (2) That which is received through documents including every form of an instrument intended to convey ideas.
- (3) That which is poorly named "real" evidence but which we shall call concrete evidence,—the visible production of an organic or inorganic object in the court room if it will tend to throw light on the case. Thus if one has his hand injured, he may show his hand that the extent of his injury may be viewed by the judge and jury. So, too, if a wagon is smashed the extent of the injury may be produced by showing the smashed wagon.

Of some matters it is often partially or totally unnecessary to produce evidence. Thus (1) when the courts take judicial notice of the fact, (2) when certain forms of confessions are made, and (3) when certain forms of admission are made it is unnecessary to produce evidence. We

will now discuss these three.

§ 493. Judicial Notice.— It is not necessary to produce evidence of the facts of which the courts take judicial notice. By "taking judicial notice" is meant the act by which the judge, in conducting a trial, or forming a decision, will, of his own mind, and without the production of evidence, recognize the existence of certain facts.<sup>b</sup>

It is impossible to enumerate every fact of which judges will take judicial notice. In a general way, however, it may be said that judges proceed on the theory that they have a knowledge of the elementary facts of experience and observation. The principal classes of the facts so noticed are as follows:

<sup>(</sup>b) Black's Law Dictionary: Judicial notice.

(1) Ordinary definitions and meanings of words in the vernacular language.

(2) The course of nature, the revolution of the earth,

the seasons.

(3) The laws of the United States and the laws of the particular State in which the court is situated. (Federal courts also take judicial notice of the laws of sister States.)

(4) The universal usages of railroads and merchants. Thus it will not be necessary to show that passengers are not regularly carried in box cars.

(5) The existence of well known federal and State of-

ficials.

(6) The existence and names of all the powers in the civilized world which are recognized by the United States government and the flags and seals of such respective nations.

§ 494. Confessions.— When a man admits the commission of a crime he is said to have made a confession. There are two classes of confessions, judicial and extrajudicial.

"Judicial confessions are those which are made to a magistrate, or, in court, in the due course of legal proceedings. It is essential that they be made of the free will of the party and with full and perfect knowledge of the nature and consequences of the confession. Of this kind are the preliminary examinations taken in writing by the magistrate, pursuant to the statutes, and the plea of 'guilty' made in open court to an indictment. Either of these is sufficient on which to found a conviction, even if followed by sentence of death, they being made, under the deepest solemnities, with the advice of the counsel, and the protecting action and oversight of the judge. \* \* \* Extrajudicial confessions are those which are made by the party accused elsewhere than in pleading before the magistrate, or in court; this term embracing not only explicit and express confessions of crime, but all those admissions of the accused from which guilt may be implied. All confessions of this kind are receivable in evidence, being proved like other facts, to be weighed by the jury.

"Whether extrajudicial confessions uncorroborated by any other proof of the corpus delicti 1 are of themselves sufficient to found a conviction of the person has been gravely doubted. \* \* \* In the United States, the prisoner's confession, when the corpus delicti is not otherwise proved, has been held insufficient for his conviction." c

Before any extrajudicial evidence will be received into evidence it must be shown (1) that the whole of what the person said at the time is offered and (2) that the confession was voluntary. By a voluntary confession is meant a confession made freely by the person accused without any hope held out to him or any threats made to him by one in authority that the confession will aid him to escape punishment or in getting a lighter punishment. This rule is based on the ground that such inducements are likely to persuade persons who are not guilty but who are charged with a crime to make confessions of crimes of which they are not guilty in order to escape lengthy trials or possible severe punishments. As one judge has said: "Every voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proving a crime to which it refers; but a confession forced from the mind by the flattery of hope or by torture of fear, comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it; and therefore it is reiected." d

§ 495. Admission.— Admissions may be defined as voluntary acknowledgments or concessions of the existence of a fact or truth of an allegation made by a party to the suit. Mr. Greenleaf says: "In our law, the term 'admission' is usually applied to civil transactions, and to those matters

<sup>(1)</sup> The body upon which the crime has been committed or the substantial fact that a particular crime has been committed.

<sup>(</sup>c) Wigmore's Greenleaf on Evidence, §§ 216, 217.

<sup>(</sup>d) Wigmore on Evidence, § 219 citing, C. B. Eyre Warwickshall's case. Leach Cr. Cds. 299.

<sup>(</sup>e) Cf. Black's Law Dictionary.

of fact, in criminal cases, which do not involve criminal intent; the term 'confession' being generally restricted to

acknowledgment of guilt." f

Just as in confessions we have judicial confessions and extrajudicial confessions so in admissions we have solemn or judicial admissions and simple or extrajudicial admissions. A solemn or judicial admission is the deliberate statement made either in the pleadings of a cause, or in court by the party or his attorney, conceding, for the purpose of trial, the truth of some alleged fact. When such solemn admission is made the other party need offer no evidence in regard to such matter.

A simple or an extrajudicial admission is a statement made by a party to a cause or by his authorized agent, either orally or in writing prior to the trial of the cause other than such a statement termed a solemn admission and in which statement the truth of some fact in issue is conceded. Such statements may be introduced in the trial of a cause as evidence against the party making the statement. Admissions are often very effective in inducing the jury to give a verdict against the party making the admission yet the necessity for offering further evidence to prove a fact set forth in such admissions is not entirely done away with, inasmuch as the trier of fact <sup>2</sup> may, if he sees fit, totally disregard such admissions.

§ 496. Burden of Proof.— When an attorney is trying a case in court he must keep two essential things in view: (1) He must satisfy the judge that his evidence is of sufficient value to go before the jury and form a reasonable basis for the verdict. If he fails to do this the court will direct a verdict against him without more ado. (2) Granting that he has passed the gauntlet of the judge, the attorney must then convince the trier of fact that the party whom he represents is the one for whom the verdict should be

<sup>(2)</sup> The trier of fact is usually the jury but if the jury has been waived then the judge may try the facts.

<sup>(</sup>f) Wigmore's Greenleaf on Evidence, § 170.

given. If he fails to convince the trier of fact, then he will lose the case.

The term "burden of proof" is a term that is applied to both of these classes of cases. In the first sense it means the duty of bringing forward a reasonable amount of evidence in support of given propositions in order to influence the judge to permit the party to proceed. In the second sense, it is the duty of convincing the trier of fact. The use of the one term for these two meanings has resulted in much confusion. Professor Wigmore suggests that we use the phrase "risk of non-persuasion" for the second meaning."

# Part II. Persons Must be Competent to Testify

§ 497. General Rule.— Persons offering evidence must be competent legally to testify. By this is meant that there must be no reason in law why such person should not testify. The most important of the classes of persons excluded at present from testifying are as follows:

# (A) Case of Mental Incapacity

- (1) Idiots and those violently insane.
- (2) Extremely young children.
  - (B) Cases of Conviction of Crime
- (1) Those convicted of treason and felony.
  - (C) Cases of Special Policy of the Law in Preserving Relations of Trust
- (1) Husband and wife.
- (2) Attorney and client.
- (3) Physician and patient.
- (4) Priest and penitent.
  - (D) Cases of Death Sealing Lips of Witnesses
- (1) One party to a contract or cause of action cannot
- (g) Wigmore's Greenleaf on Evidence, § 14x.

testify as to the terms of the contract if the other party to the contract or cause of action is dead.

§ 498. Mental Incapacity.— In regard to mental incapacity it must be said that an idiot or one violently insane cannot testify as a witness. If a person who is insane has a lucid interval, however, during which he is sane he may testify at that time. Extremely young children,<sup>3</sup> for example, a child of two years would scarcely be allowed to testify and it is even highly improbable that a child of five would be allowed to testify. The reason upon which this rule is based is that such persons are not capable "to observe (correctly), to recollect, and to narrate intelligently" nor do they understand the normal duty to tell the truth.

§ 499. Criminals.— In some jurisdictions persons convicted of heinous offenses, such as treason and murder, are not competent as witnesses. In other jurisdictions, such persons are allowed to testify but their evidence is not of

great value in convincing the trier of fact.

§ 500. Relations of Trust.— The policy of the law is to preserve relations of trust. For this reason, among others, certain persons are incompetent to testify. Thus neither a husband nor his wife can be compelled to testify to confidential communications from one another.<sup>4</sup>

The rule is firmly established that an attorney cannot be compelled to testify against his client as to any confidential matters communicated by his client. If such communications were not protected, no man would dare to consult a professional adviser with a view of his defense or to the enforcement of his rights. A client may waive this privilege if he sees fit.

- (3) The age at which a child may testify must largely be left to the discretion of the judge although it seems to be conclusively presumed that from 14 years of age up the court must permit testimony to be offered. Of course, if a child even at that age shows very little intelligence its testimony will not be of much value.
- (4) In some jurisdictions today the husband or wife cannot even testify for each other. In many jurisdictions they cannot testify against each other except in special cases. These rules, however, are based on other theories.
  - (h) Wigmore's Greenleaf on Evidence, § 238.

In some jurisdictions it is also held that a physician cannot be compelled to testify as to what has been told him by his patient in regard to pain and suffering for an injury for which the physician has treated the patient, without the consent of the patient. In some jurisdictions it is also held that a priest cannot be compelled to testify to confidential communications made by a penitent.

§ 501. Death of One Party to a Contract.—Statutes have been passed in the various States forbidding one party to a contract or cause of action from testifying to a fact or to a situation involved in a given transaction if the other party to the contract or cause of action is dead. For this reason, if for no other, it is always best to have all contracts

reduced to writing.

# Part III.. Evidence Must be of the Personal Knowledge of the Witness

- § 502. Rule and Explanations.— The general rule is that all evidence which is offered must derive its credit from the character and veracity of the witness himself and must rest on his own knowledge. Says Mr. Greenleaf: "But it is requisite that, whatever facts the witness may speak to (testify to) he should be confined to those lying in his own knowledge, whether they be things said or done, and (he) should not testify from information given by others (to him) however worthy of credit they may be. For it is found indispensable, as a test of truth and to the proper administration of justice, that every living witness should, if possible, be subjected to the ordeal of a cross-examination 5 that it may appear what were his powers of perception, his opportunities for observation, his attentiveness in observing, the strength of his recollection and his disposition to speak the truth. But testimony from the relation of third persons [i. e., which other persons have related to the
- (5) Cross-examination is an examination of a witness by the attorney of the person against whom the witness is testifying, in order to test the truth of the witness's statements or accuracy of his observation.

witness] even where the informant is known, cannot be subjected to this test; nor is it possible to ascertain through whom, or how many persons, the narrative has been transmitted from the original witness (observer) of the fact." i

There seems to be two classes of evidence which does not rest upon the knowledge of the person observing. The first class is so-called "hearsay" evidence and the second is

"opinion" evidence.

§ 503. Hearsay Evidence.— Hearsay evidence has been termed "a sort of second-hand evidence." Hearsay evidence is that evidence which the witness offers not from his own knowledge but rather from what some one else told him. The so-called hearsay rule prohibits the witness from testifying to that which some other person has said in regard to the facts of the case. There are many reasons for this rule, the principal ones being as follows:

(1) The person who made the statements to the witness may have been telling a falsehood. Such third person is not before the court so that his demeanor can be observed. nor can a solemn oath be administered to him before he makes the statement, nor can he be prosecuted for perjury if he lies, nor can he be cross-examined as may be all wit-

nesses before the court.

(2) Although the witness before the court is ready to testify that such third person told him certain things yet the witness himself may not remember correctly what the third person said, and in matters of justice it is extremely dangerous to take any chances. The third person should be brought into court and made to testify himself.

# EXAMPLE:

Allen and Baker had a fist fight. Donald is an eye witness to the fight while Carter is not an eye witness. Donald told Carter all about the fight. Allen sued Baker for damages and Carter was brought in as a witness to tell what he knew of the fight. Carter could not testify, inasmuch as he himself had not seen the fight and therefore what he knew about it was only hearsay information. Don-

<sup>(</sup>j) Wigmore's Greenleaf on Evidence, § 98.

ald, however, would be allowed to testify. In such cases the reader can plainly see that Donald's statement to Carter should not be admitted to prove what he saw yet if Donald later testifies differently than his previous statements to Carter that fact may be shown to impeach or discredit Donald's testimony. Cf. Page v. Parker, 40 N. H. 47.

Now this hearsay rule has absolutely no application when the question is whether certain words were uttered. Thus, if Allen told Baker that Carter was a robber, a thief, and a murderer, then in a slander suit brought by Carter against Allen for the statements made, Baker would be allowed to testify as to the words which Allen uttered in regard to Carter's character. In this case the first essential is to determine whether or not Allen uttered the words and Baker would be able to testify of his own knowledge as to that matter.

Another class of cases in which the hearsay rule has no application exists where a person utters certain words in connection with what he does. Thus suppose Allen, a motorman on a street car, runs his car over Baker and at the same time cries out: "There is one of my enemies put out of the way." If Carter heard Allen utter these words at the time Allen did the deed, Carter may testify to that fact. Again in such a case it is not the truth of the words uttered by Baker that is in question. It is only the question whether Baker actually uttered these words and if he did so the words would become an integral part of the wrongful act. Moreover Carter is able to testify of his own knowledge whether or not he heard the words uttered.

Aside from the classes of cases in which the hearsay rule has no application whatever, there are a number of classes of cases in which the hearsay rule logically should have application, and yet in which the courts have decreed, by a long line of decisions, that the evidence may nevertheless be introduced. It must be recollected that the reason for establishing the hearsay rule was that it was desirable that if any statements are to be used as evidence to prove or disprove the truth of the matter in controversy, that the per-

son making such statement should be brought into court, where he can be put under oath, and where his demeanor can be watched, and where he can be subjected to a rigid cross-examination. There are, however, a number of classes of cases in which it is necessary to accept hearsay evidence if any evidence at all or at least any evidence of any consequence is to be adduced. But even in such cases the courts have not permitted the evidence to be introduced unless there were circumstances surrounding the making of the statements by the party who is not in court as a witness, to compensate, in a measure, for the lack of opportunity to observe his demeanor or to cross-examine him. The most important of these classes of cases known as exceptions to the hearsay rule are as follows:

(1) Declarations in pedigree cases.

(2) Dying declarations.

(3) Regular entries in the course of business.

(4) Representation on matters of public improvements.

(5) Declarations against interest.

(6) Regular official and commercial publications.

(7) Learned treatises.

We will now explain these seven exceptions:

§ 504. Declarations in Pedigree Cases.— If some member of a family, who is now dead but who when living made a definite statement to some third person or made a definite statement in writing in regard to a birth, marriage, death, legitimacy, or the like of some other member of the family, before any controversy was started in regard to such event, then such third person to whom the statement was made or if the statement was in writing, then such writing may be brought into court as evidence. The reason upon which this exception is based is that (1) the person making the statement was in a position to know what he was talking about, (2) the person making the statement is now dead and therefore cannot be brought into court to testify, (3) the statement was made before the controversy was begun and there was therefore probably no cause for the person making the statement to lie or falsify.

§ 505. Dying Declarations.— If a person is dying or honestly believes that he is in a dying condition, and he makes a statement to some third person as to the circumstances attending or leading up to the cause of his condition, and then after making such statement he actually dies, any third person to whom the statement was made may testify as to the statement made to him by the dying man, in a murder trial charging some other person with having caused the death of the man who made the statement.

In this the reader will again note that the man making the statement cannot be brought into open court and testify since he is dead, and that the fact that he made the declaration when he was in a dying condition creates a sort of inference that the man will not deliberately lie before facing his Maker. Moreover the statement can only be used in homicide cases (trial for killing a human being) and then only in regard to circumstances tending or leading up to death.

§ 506. Regular Entries in the Course of Business.—Where a person in the course of his employment or as a matter of custom makes a regular entry in the books of a business establishment contemporaneous with the occurrence of a business transaction, and if such person making the entry then dies or disappears from the community, such entry can be introduced as evidence into court. In this case again the person who actually knows of the transaction cannot be brought into court but his records still exist and inasmuch as the records were made in the regular course of business and probably with no intention of deceiving, the courts have allowed the entries to be used as evidence.

And today even when a person making the entry is alive and is present the courts allow the records he made in the regular course of business to be introduced into evidence. This is sometimes allowed on the theory that the witness is simply refreshing his memory from the record. In other instances this is allowed either under statutes or under the theory that one is not likely to falsify his regular account books. § 507. Representation on Matters of Public Improvements.— Where persons have lived in a community for a long time and are in a position to know matters of general public improvements such as boundary lines of the district, and they make statements to third persons in regard to such matters, such third persons can testify as to what they were told, provided the persons making the statements are now dead or cannot be found. The same reasons for the exception to the rule in the first class of cases applies in this class.

§ 508. Declarations Against Interest.— Where a person who is now deceased, makes statements when alive that are derogatory to his own financial interests, then such third persons who hear such statements may testify to them. The reasons on which this exception is based are that it is taken for granted that the man knew about his own business, that he made a statement against his own pecuniary or proprietary interest (as, for example, that he owed money), and that he is now dead, then such statement should be allowed in evidence, inasmuch as the man is dead and therefore cannot be brought into court to testify and inasmuch further as it is not at all likely that he would make a false statement against his own proprietary or pecuniary interests.

§ 509. Regular Official and Commercial Publications; Learned Treatises.— Statement made in regular official and commercial publications and in learned treatises may be introduced into evidence although the persons writing the articles are not present. These exceptions are based on the reasons that standard publications are not made for the purpose of deceiving but rather enlightening the public and that they

are presumably correct.

§ 510. Opinion Rule.— It will be recollected that it was previously stated that aside from hearsay there was another large class of evidence which does not rest upon the witness's own knowledge. This class was called opinion evidence. Opinion evidence is simply the evidence as to what the witness's opinion on a given matter is and not as to what his knowledge is. Such evidence is ordinarily not admissible. Thus if an attorney should ask a witness Baker, in a damage

suit against Allen whether in the judgment of the witness Baker, the defendant was or was not careless or negligent, such a question would be objectionable. Baker's duty is to tell what he saw Allen do. It is then for the jury to determine whether or not Allen was negligent. There seem to be two classes of exceptions to the opinion rule:

(1) Experts, that is, persons having special knowledge of certain subjects, may draw inferences from a given state of facts in order that the jury may get the benefit of such

expert's opinion on a hypothetical statement of facts.

(2) Persons who have no special skill but who have personally observed some state of facts in issue and the matter is of such a character that any person of ordinary sense can form an intelligent judgment thereon, they are sometimes allowed to give their opinion. Suppose, for example, that Allen had lived for ten years in the home of Baker who is now dead. Suppose further that there are those who are trying to have Baker's will set aside on the ground that Baker was insane when he made the will. In many jurisdictions Allen would be allowed to state what general facts he could give the jury and to state whether in his opinion Baker was sane or insane during the ten years Allen lived with Baker. Again where Allen is familiar with Baker's hand writing, Allen may testify whether in his opinion a given writing before the court is that of Baker's.

# Part IV. Materiality and Relevancy

§ 511. Definitions and Explanation.— Evidence must be both material and relevant. "Material" and "relevant" are two terms much used in the law of evidence. Material evidence may be defined as that evidence which goes to prove or disprove substantial matters in dispute. Relevant evidence may be said to be that evidence from the adducing of which the trier of fact may infer some fact which will tend to prove or disprove the substantial fact in controversy. Thus relevancy rests upon the laws of logic.

### **EXAMPLES:**

- I. Allen sued Baker for a breach of written contract. At the trial Allen testified that the contract was made at 10 A. M. Monday, March 6th, 1911. The attorney for Baker then attempted to offer the evidence that the contract was not signed until 10:15 A. M., although that fact made absolutely no difference in the suit for the breach of contract. Such evidence would be inadmissible because it would be totally immaterial it would not tend to disprove any substantial matter in issue. Cf. Lightfoot v. People, 16 Mich. 507.
- 2. Allen knew that Baker had a reputation for being a dangerous and evil man in the community in which they both lived. One day Baker assaulted Allen whereupon Allen shot Baker. When on trial for murder Allen wished to show by way of self-defense that he knew Baker had a reputation for being a dangerous man and that he (Allen) believed that Baker would have killed him (Allen) if he (Allen) had not killed Baker first. Such evidence is relevant evidence. Although it does not directly prove that Allen was acting in self-defense, yet it does prove the fact from which the jury may infer that Allen may have been honestly attempting to protect himself.

# Part V. Special Rules in Regard to Written Instruments

- § 512. Introduction.— There are four special rules in regard to written instruments which we will now briefly discuss, namely, best evidence, parol evidence, spoliation of evidence, and alterations.
- § 513. Best Evidence Rule.— Where one wishes to introduce written evidence at a trial it is necessary as a general rule that he introduce the best evidence obtainable, that is, original documents or writings. Thus, where a written contract is in controversy one should introduce the original written contract signed by the parties and not a copy of such contract.

A number of exceptions to this rule have sprung up. Thus where the controversy involves a matter recorded in public documents, inasmuch as it is for the best interest of the public that all public documents should be kept in a certain place where they may be accessible to all alike, certified copies <sup>6</sup> of the original may be introduced. Again if a per-

(6) A certified copy is an exact copy of a document to which a statement is attached by the proper officials that such document is an exact copy.

son can convince the judge that a writing in question has been lost or destroyed without his fault, then he will be allowed to introduce so-called secondary evidence, that is copies of the writing or oral testimony as to the contests of the writing. The third exception to the rule exists in the cases where the adverse party to the suit has possession of the written documents and he refuses to produce them in court. Then secondary evidence can be introduced. In many States special statutes have been passed enlarging these exceptions.

§ 514. Parol Evidence.— The parol evidence rule is a rule of the law which declares that evidence of a prior or contemporaneous oral agreement cannot be introduced to vary or contradict the terms of a written instrument. Thus where two persons make a valid written contract, one of the parties cannot afterwards show that at the time of making the written contract the other party agreed that the contract should be otherwise than as stated in the terms thereof. But it must be noticed that this rule is that prior or contemporaneous oral agreements cannot be so used. If an oral agreement occurs after the making of the written contract and if it can be clearly proved to exist, and if supported by a valuable consideration then such evidence can be introduced.

The reason for the parol evidence rule is that when men have put into writing their contracts they are then presumed to embody in such writings their final intention. Inasmuch as third persons not parties to the writings are not bound thereby, no injustice is done, at least in the eyes of

the law, by such rule.

The parol evidence rule has no application if one of the parties is attempting to have the written instrument cancelled by a court of equity on the grounds that his signature to the instrument was obtained by fraud, or duress, nor does the rule apply if one of the parties is attempting to prove that the instrument was in violation of the law or that there was no consideration for the contract. In all these cases parol evidence may be introduced, for if such evidence

could not be introduced to show the invalidity of the instrument, then no instrument could be invalidated on the grounds mentioned.

§ 515. Spoliations and Alterations of a Written Instrument.— The spoliation of a written instrument is ordinarily said to be the destruction or mutilation by some third person of written instruments which are later needed in the trial of a case but spoliation is often used to include the destruction of written instruments also by a party to the suit. If the written evidence is destroyed by some third person then the immediate parties to the writings cannot be held to have lost any of their rights to such case, although it is then difficult to replace the evidence by secondary evidence. But if a party to the suit has destroyed any of the written evidence then every inference will be taken against him. the case was such in which the written evidence is necessary on which to base the suit, and the one destroying the evidence is the one bringing the suit then he cannot recover.

The alteration of a written instrument is the change of any of its provisions. An alteration is usually spoken of in connection with one of the parties to the instrument but it is also used to indicate the changes made by a person not a party to the instrument. If a material alteration is made by a person to a written instrument then he cannot use such instrument as a basis on which to bring suit. But if the party altering the instrument is the defendant in the case, then the plaintiff (the other party to the instrument) can either recover on the original instrument (as it was before the alterations were made) or he can, if he chooses, recover on the instrument as altered. If persons not parties to the instrument of their own accord altered the instrument, the rights of the parties to the instrument are not affected by such changes.

# **QUESTIONS**

I. Define the term "evidence." What are its sources?

II. When is it unnecessary to produce evidence?

III. What is judicial notice, and of what facts do courts take judicial notice?

IV. Enumerate and define the classes of confessions.

V. Define the term "admissions."

VI. What does the expression "burden of proof" mean? If there is more than one use of the term give all its uses.

VII. Is a child of eight years competent to testify as a witness to an occurrence which it has

seen?

VIII. Can an attorney testify to a fact privately communicated to him by his client if his client objects?

What is the reason for this rule?

IX. Allen made an oral contract with Baker in regard to a certain matter. Allen then died. Baker wished to prove the existence of the oral contract. Can he testify to the terms of the contract?

Give reasons for your answer.

X. Give an original illustration of the following: the hearsay rule; of two exceptions to the hearsay rule; of a case which, although apparently within the scope of the hearsay rule, yet is really without the scope of the rule; of the opinion rule; of the parol evidence rule.

XI. Give an original illustration of evidence which, although relevant, is not material. Give an original illustration of evidence which is not relevant;

of evidence which is not competent.

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